91-1341

Supreme Court, U.S.
FILED
FEB 18 1992
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

THANH VONG HOAI, JOHN D. HEMENWAY, DAVID HEMENWAY
Petitioners,

THANH VAN VO, MILLARD F. OTTMAN, DAVID C. ROSEMAN, JONES, DAY, REAVIS & POGUE, J. GORDON FORESTER, JR., GEOFFREY WAGNER, JOSEPH ZULLI, SUN REFINING & MARKETING COMPANY, INC.
Respondents.

Appendix 2 to
Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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TABLE OF CONTENTS
APPENDICES I, II AND III

Opinion, United States Court of Appeals for the District of Columbia A-1

Order, United States District Court for the District of Columbia A-27

Memorandum, Louis S. Oberdorfer, United States District Judge, United States District Court for the District of Columbia A-29

Order, Petition for Rehearing A-43

Order, Appellants' Suggestion for Hearing En Banc A-45

Transcript, Oral Argument Before Panel of the United States Court of Appeals for the District of Columbia A-47

Civil Docket for Case # 89-CV-2397, U. S. District Court for the District of Columbia A-107

Plaintiffs' Motion for a Stay Pending Resolution of a Question of Federal Rights A-135

Order, United States District Court for the District of Columbia A-143

Plaintiffs' Memorandum of Points and Authorities in Support of: Plaintiffs' Motion for a Stay Pending Resolution of a Question of Federal Rights A-147

Plaintiffs' Motion for an Indefinite Stay A-181

Order A-185

Plaintiffs' Memorandum of Points and Authorities in Support of: Plaintiffs' Motion for an Indefinite Stay A-187

Record on Appeal from the United States District Court for the District of Columbia A-193

Statement of the Issues Presented for Review, United States Court of Appeals for the District of Columbia A-205

Reply Brief of Appellants Thanh Vong Haoi, David Hemenway and John Hemenway Replying to Brief for Appellees Jones, Day, Reavis & Pogue, Millard F. Ottman, Jr. and David C. Roseman A-289

Reply Brief of Appellants Thanh Vong Hoai, David Hemenway and John Hemenway Replying to Brief for Appellees Sun Refining and Marketing Company, J. Gordon Forester, Jr., Jeffrey Wagner and Joseph Zulli A-329

Complaint, Hoai et als v. Vo et als A-371

Supplement to the Motion for Sanctions on Behalf of Sun Refining amd Marketing Company A-405

Extract, Deposition of Ernest Peele A-413

Transcript, Hearing before the Honorable Annice Wagner, Judge, Superior Court of the District of Columbia, Civil Division A-417

Temporary Restraining Order, Superior Court of the District of Columbia, Civil Division A-461

Consent Order for Extension of Temporary Restraining Order as to Defendant Sun Refining and Marketing Co. A-465

Affidavit of Jeffrey W. Wagner A-471

Motion to Dismiss of Defendants Millard F. Ottman, Jr., David C. Roseman, and Jones Day, Reavis & Pogue A-475

Memorandum of Defendants Millard F. Ottman, Jr., David C. Roseman, and Jones, Day, Reavis & Pogue in Support of Motion to Dismiss A-479

Docket, U. S.. District Court District of Columbia (Washington), Case # 887-CV-2456 A-537

General Docket, United States Court of Appeals for the District of Columbia, 90-7170 (Stamp) Appeal from the District Court A-566

Oral Argument scheduled for
May 13, 1991, 9:30 am

IN THE UNITED STATES COURT OF APPEALS
FOR THE DITRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

v.

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLANTS THANH VONG HOAI AND DAVID HEMENWAY AND JOHN HEMENWAY

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February 27, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	USCA No. 90-7170
THANH VAN VO, et al., Appellees.	)	

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. PARTIES AND AMICI

Appellants and Plaintiffs below: Thanh Vong Hoai, David Hearn Hemenway, and John D. Hemenway.

Appellees and Defendants below: Thanh Van Vo [we have no information whatsoever concerning Vo's alleged alias of "Thoi Van Vo"], Millard Ottman, Jr., David C. Roseman, Jones, Day, Reavis & Pogue, J. Gordon Forester, Jr.; Geoffrey Wagner, Joseph Zulli, and Sun Refining and Marketing Co.

B. RULINGS UNDER REVIEW

The Memorandum and Order signed October 1, 1990, but filed October 2, 1990 by Judge Louis F. Oberdorfer of the United States District Court for the District of Columbia in CV 89-2387 dismissing the appellants' civil rights action and requiring the counsel for the appellants to state why they should not be held for sanctions under Rule 11 without stating any specific reasons.

There is a related Memorandum and Order of October 1, 1990, but filed on October 1, 1990, also by Judge Louis F. Oberdorfer of the United States District Court, granting the chief plaintiff in the civil rights case judgment on the merits in a Petroleum Marketing Products Act (PMPA) case which is not being presented for review, but which is related because the decision on the merits had important, even a dominant effect upon certain aspects of the civil rights decision upon

which review is requested in that the same actors, facts and issues are bound together. Admittedly, the actors shift roles somewhat, but it is important to know about this case, too, which already has been before this court and in which the plaintiffs in the civil rights case prevailed. See: **Thanh Vong HOAI, Appellant, v. SUN REFINING AND MARKETING COMPANY, INC., 275 U.S. App. D.C. 397 (1989).** Since the decision by J. Oberdorfer on the civil rights cause of action was made the very same day (filed the next day) as the PMPA decision on the merits favoring the plaintiffs, the civil rights plaintiffs never received any kind of a hearing, opportunity to amend, or due process in the sense that the procedures for a Motion for Summary Judgment should have been followed instead of the rules applying to a Motion to Dismiss, which was not done, despite the fact that extensive materials outside

the pleadings were considered and cited by the trial judge in his memorandum.

C. RELATED CASES

The closely related case of Hoai v. Sun Refining, referred to above has been before this Court previously. There is also pending before the Superior Court of the District of Columbia a case which is stayed pending the outcome of the federal PMPA case of Hoai v. Sun Refining, USDC(DC) CA 87J-2456, which has been before this Court, as noted above. The Superior Court case initiated all of the litigation connected with the fact patterns common to the several actions **but was found not to be co-extensive** when the case was examined by this Court, in Judge Edwards written memorandum. (See Hoai v. Sun Refining and Marketing Company, Inc., at p. 401.) The D.C. Superior Court case is captioned: Thanh Van Vo v. Sun Refining

and Marketing Co., et al., (CA 7075-86), Superior Court, District of Columbia. Additionally, a R.I.C.O. case brought by Sun Oil franchisee Hoai against Thanh Van Vo and certain other parties in the United States District Court (EDVa.) was dismissed on the premise the "enterprise" consisted of only one criminal action, whereas, two or mere were required (at that time, evidently no longer) for commencing a R.I.C.O. action. That case, however, did not include any of the appellees in this case except for the principal actor who this train of litigation in the Superior Court, i.e., Thanh Van Vo and was brought to the attention of this Court during the oral arguments heard on December 12, 1988.

Respectfully submitted,
FOR THE PLAINTIFFS

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TABLE OF CONTENTS

Certificate as to Parties, Rulings and Related Cases i-iii

Table of Contents

Table of Authorities

Statement of Issues Presented 1
I. Statement of the Issues Presented for Review 1
II Statement of the Case 5
A. Nature of the Case 5
B. Course of the Proceedings 11
C. Relevant Facts 16
III Jurisdiction 26
IV Summary of the Argument 26
V Argument 27
A. 42 U.S.C. 1983 27
B. Attorneys as Parties 30
C. 42 U.S.C. 1985(2) 32
D. 42 U.S.C. 1985(3) 33
E. 42 U.S.C. 1981 35
F. 42 U.S.C. 1982 36
G. The Conversion to Summary Judgment 36
H. Chilling with the Show Cause 38

Conclusion 49

CASES

Browning-Ferris Industries, Inc. v. Kelco Disposal Inc. (1989) 109 SCt 2902 47

City of Long Beach v. Bozek (1982) 31 Cal 3d 527, 183 Cal Rptr 86, 645 P2d 137 29

*Cooter & Gell v. Hartmarx Corp. (1990) 110 SCt 2447, 2554 37

*Gardels v. Central Intelligence Agency (CA DC 1987) 637 F2d 770 36

Griffin v. Breckenridge (1971) 403 US 88, 91 SCt. 1970 33

Hoai v. Sun Refining & Marketing Co., Inc., (CA DA 1989) 866 F2d 1515 6

Hobson v. Wilson (CA DC 1985) 737 F2d 1, cert den. 470 US 1084 33

Imbler v. Pachtman (1976) 424 US 409; 196 SCt 984, 47 Led2d 128 30

In Re Kelly (CA7 1986) 808 F2d 549, 552 38

In re Primus (1978) 436 US 412, 56 Led2d, 98 SCt 1893 29

*Lugar v. Edmondson Oil Co. (1982) 457 US 922 1,26,27

Oliveri v. Thompson (CA2 1986) 803 F2d 1265 41

Rowland v. Fayed (D DC 1987)
115 FRD 605, 608 40

Tarpley v. Greene (CA DC 1982)
684 F2d 1 36

*Tele-Communications of Key West, Inc.
v. United States 1 Fed Rul Serv 3d
960, 756 F2d 1330 (CA DC 1985) 35

Tom Growney Equip. v. Shelley Irr.
Development (CA9 1987) 834 F2d 833,
836 40

White v. New Hampshire Dept. of
Employment Security (1982) 455 US
445, 71 Led2d 325 41

STATUTES

Federal Petroleum Marketing
Practices Act (PMPA) (15 U.S.C.
2801 et seq. ad seriatim

42 U.S.C. 1985 (2) ad seriatim

42 U.S.C. 1985 (3) ad seriatim

42 U.S.C. 1981 ad seriatim

15 U.S.C. 2805 (d) 13

28 U.S.C. 1343 25

28 U.S.C. 1331 25

28 U.S.C. 2201 25

28 U.S.C. 2202 25

42 U.S.C. 1983 25,26,27.29

42 U.S.C. 1985(2) 25

42 U.S.C. 1985 (3)	25
42 U.S.C. 1982	ad seriatim

OTHER AUTHORITIES CITED

Rule 56 (f)	4,56
Rule 60	13
First Amendment	5
Rule 12 (b), (b)(6)	ad seriatim
Rule 11	13

* Cases most relied upon

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	USCA No. 90-7170
THANH VAN VO, et al., Appellees.	)	

I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1) Whether in 1986 provisions of Local Rule 12-I(b)(i) of the Superior Court of the District of Columbia, (which provided for virtually unfettered ex parte decisions) created, along with certain other regulations, customs and usages of the District of Columbia, a situation like that of the Virginia pre-judgment attachment statute in Lugar v Edmondson Oil Co. (1982) 457 US 922 so as to subject the private party defendants here to liability for their use of that rule and procedures to deprive plaintiffs below of federal constitutional and statutory rights, including:

A) due process,

B) equal protection,

C) to petition for the redress of grievances,

D) to freely associate as client and counsel and as client to have counsel

E) as principal and agents, to not have a valuable gas station franchise terminated illegally in violation of the Federal Petroleum Marketing Practices Act (PMPA) (15 U.S.C. 2801 et seq.),[1]

F) not to be injured in their person or property for being a party in a federal court and attending and testifying fully therein under 42 U.S.C. 1985(2),

G) to be free of 1985(3) conspiracies,

H) to enforce a contract under 1981 and

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[1]That there was such a violation by the defendant Sunoco is now a matter of res judicata in the related case which was formerly before this Court on intermediate appeal on the question of abstention.

I) to lease and hold property under 1982,

J) to have a valid bond for security as part of due process whenever property and rights are preliminarily interfered with.

2) Whether private attorneys are liable when using a Lugar-like procedure to deprive persons of such rights on behalf of their clients when they know or have reason to know that what they are doing is a deliberate use of the court's procedures and the color of its authority to deprive the plaintiffs of due process and the other rights set out above ?

3) Whether private attorneys are liable when they use such procedures maliciously and willfully including the use of false representations and other improprieties ?

4) Whether parties who conspire together to injure other parties in their

property for having previously attended and testified at a hearing in a federal court are liable to those parties under 42 U.S.C. 1985(2) ?

5) Whether parties who seek to bar equal rights to a minority group member because he is a member of his own minority group by cooperating with another member of that same ethnic minority where the latter individual is part of a group within that minority population that appears to be using classic techniques of extortion and threats to dominate its own ethnic group members by "private justice" which has the effect of barring members of the ethnic minority from equal access to American justice, are liable for 42 U.S.C. 1985(3) violations ?

6) Whether such activity used to prevent the enforcement by the ethnic minority group plaintiff and the non-minority people assisting him of a valuable service

station franchise contract makes the parties liable under 42 U.S.C. 1981 ?

7) Whether such activity used to prevent the plaintiff and those assisting him from exercising the right to lease and hold property violates 42 U.S.C. 1982 ?

8) Whether the lawyers who participate in these activities are liable even if they act maliciously and willfully and are charged with a knowledge that their acts are wrongful as evidenced by their acts and deeds, including false representations and deceit upon the court ?

9) Whether, where a judge has before him two related cases, one of which seeks 42 U.S.C. 1983 and other civil rights relief which would be greatly affected by the outcome of the other suit, and the other suit, which is under 15 U.S.C. 2801 et seq. is awaiting cross summary judgments, and the parties plaintiff move for stays in the civil rights suit pending the

outcome of the summary judgment motions in the other suit, is it error for the judge handling both suits to grant the plaintiff in both suits summary judgment in the PMPA case and then not allow any time to the plaintiff and his co-plaintiffs to amend matters in the civil rights suit in order to incorporate the effects of the PMPA judgment as anticipated before dismissing the civil rights suit ?

10) Whether, in the above situation it is error for the court to ignore the motions for stay in the civil rights case, convert the dismissal motions to summary judgment motions by entertaining and considering matters outside the record without warning or notice and on the same day that it grants the summary judgment victory to the plaintiff in the PMPA action dismiss the civil rights action of that same plaintiff and his two agents ?

11) Whether, in the above situation, it is error for the court to convert the dismissal motion to summary judgment without the fact statement required by local rules or without any further opportunity to develop or present facts or without opportunity to amend or to even request any discovery pursuant to Rule 56(f) or to modify pleadings and any hearing, contrary to a practice established over three years of litigation ?

12) Whether, where, simultaneously and as part of the dismissal order of the civil rights case the court, at the end of its memorandum, issues an unspecified show cause to the attorneys of the successful party plaintiff in the PMPA case to show why they shouldn't be sanctioned the same is error because of other factors which indicate, considered objectively, that the court has as its intention, the control of the plaintiffs' overall litigation in the

manner that General Powell stated he was going to treat the Iraqi army in Kuwait ?

13) Whether the use of a show cause for sanctions as an integral part of this dismissal order violates the established law on what the sanctions rule and statutes should not be used for and violates first amendment and due process rights and, potentially, at least the right to be free of the threat of excessive fines of an amercement type under the excessive fines clause of the Eighth Amendment ?

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from an order of the lower court, accompanied by a memorandum opinion, which dismissed a civil rights complaint filed by the plaintiffs/ appellants pursuant to motions brought pursuant to Rule 12(b), ostensibly on Rule 12(b)(6) grounds. The order and memorandum were

signed on October 1, 1990 and filed the next day. (V.2, JA, 786, 778-85) Though the motions were dismissal motions, filed principally pursuant to Rule 12(b)(6), materials outside the record, including affidavits, were filed and not excluded and were considered in forming the memorandum opinion. However, none of the requirements surrounding summary judgment motions, including filing the required fact statement, were observed.

The underlying factual situation is related to another cause, also before the same court below, which also has previously been before this Court. That is the related case of Hoai v Sun Refining & Marketing Co., Inc., a case under the Petroleum Marketing Practices Act (PMPA) 15 U.S.C. 2801 et seq. In that case Sun had used the device of a "consent order" between itself and a man named Vo, also Vietnamese like Hoai, which purportedly

was an extension of a TRO issued by a judge of the Superior Court of the District of Columbia to take a franchise away from its franchisee, the plaintiff Hoai (also the principal plaintiff here) and give it to Vo. Plaintiff/appellant Hoai in that case sued upon that as a termination of his franchise. That case was previously before this court on an intermediate appeal. Hoai v Sun Refining & Marketing Co., Inc. (CA DC 1989) 866 F2d 1515. In that intermediate appeal this Court decided that the court below had improperly sua sponte abstained from deciding the PMPA case on the theory that it should have been decided in the Superior Court of the District of Columbia.

After that decision and upon remand, on March 27, 1989, the plaintiff Hoai in that case moved for summary judgment on the question of liability only because this Court's opinion made it clear that since

the "consent order" in the Superior Court did not represent any independent judgment of a judge of that court the use of it to take the gas station franchise in question was a termination under the PMPA. On October 1, 1990 that motion was decided in favor of the plaintiff Hoai, also the principal plaintiff/appellant in this case. This was the same day as the dismissal order and memorandum appealed from in this case were handed down. So that the court below decided them in coordination.

Both of these federal suits were reluctant and rather later in the day and grew out of incidents in which the man Vo sued Hoai, Hoai's attorney and Hoai's attorney's son in the Superior Court of the District of Columbia in violation of a settlement agreement, the evidence of which is in the record now of the Superior Court case, under which Sun agreed to and

did award the gas station franchise to Hoai. Those same three individuals are the plaintiffs/appellants in this cause and this cause also grew out of what happened in the Superior Court in 1986-87 (CA 7075-86). The PMPA case was brought in the court below because the statute of limitations was running and action in disposing of the suit against the three present plaintiffs/appellants in the Superior Court was stalled.

Similarly, this suit was brought in this court as the three-year statute of limitations was running out in August of 1989, after the judges of the Superior Court made it known on the record that they would prefer that federal questions be settled in the federal courts and had in fact stayed action in that court on Mr. Vo's claim, which was originially principally against Sun and the three plaintiffs/appellants herein. Thus this

suit was brought as the statute was running and while the principal plaintiff herein was awaiting a decision on his summary judgment motion resulting from this Court's decision in his PMPA case. As with the earlier filing of the PMPA case the plaintiffs herein only filed this cause because earlier, in 1987, when they had removed the Superior Court case to the federal court, Judge Sporkin of this Court had remanded it, failing to discern the cardinal importance of the PMPA issues.

The theory of this case is that the action of obtaining the consent order in the Superior Court, which was achieved ex parte under a rule of that court, since repealed, that took place on September 8, 1986 and terminated the franchise of Hoai (as is now res judicata), along with certain other actions that were taken in order to set up that possibility and others, subsequently taken, to preserve

it, violated the civil rights of Hoai, as the principal plaintiff, and of his attorney and his attorney's son, who were acting as his agent. In particular, to the extent that the rules and procedures of the court were used to achieve the taking of the gas station franchise from Hoai and give it to Vo 42 U.S.C. 1983 was violated. Due process and the violation of the PMPA rights of Hoai and his agents were the most prominent of the federal rights violated under this color and authority of D.C. law. Although the PMPA clearly preempts all state and common law remedies in the area of termination or nonrenewal of a franchise (at least between the same parties) (15 U.S.C. 2806(a)) it does not appear in any way to preempt other violations of federal statutory rights that overlap with the rights it establishes and involve, as here, other parties in addition to the

two, the franchisor and franchisee, affected by the jurisdiction created by the PMPA.

To the extent that the ex parte action which resulted in the taking of the franchise from Hoai and giving it to Vo was intended to harm Hoai and his agents in their property for their having stood up to Vo at the TRO hearing and testified to his attempted violence and threats of violence (while Vo sat there and declined to testify) 42 U.S.C. 1985(2) was violated.

To the extent that it was known to the defendants that Hoai had been threatened by Vo and victimized by Vo's fraudulent and extortionate acts, or they had reason to know it, and they knew, therefore, that Vo was barring Hoai from equal access to justice because Hoai was Vietnamese and Vo and his colleague Thach and others of such an ethnic "gang" preyed upon their own,

and to the extent that they joined in that activity by choosing Vo over Hoai 1985(3) was violated. (See affidavit of Hoai as filed below, generally, JA Vol. III, para. 1121-1390, especially paras. 1353-1356).

Similarly, although not mentioned in the first complaint[2] the prevention of the plaintiffs/appellants' attempts to enforce Hoai's franchise contract violated section 1981 and the interference with the leasing and holding of the franchise arguably violated 1982. Several Bivens type direct violations of constitutional rights were also alleged, though not as separate counts

All of this centered around the use of the D.C. court's rules to eliminate Hoai's counsel, its case law and rules to elevate local landlord and tenant law above the

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[2]Plaintiffs/appellants were allowed no chance to amend, one of their complaints of error in this appeal, but they did subsequently propose to amend in connection with a Rule 60(b) motion.

PMPA, its judge in chambers rule to extend the TRO ex parte without notice or due process for the real party in interest. Then there was the practice and custom of that court that allowed the defendants to "post the bond" required by the TRO as a precedent condition with an NSF check drawn on the account of the plaintiff Hoai's own gas station, which the defendant Vo had taken over in violation of the PMPA. (Vol. II, JA para.1097-1102) Further, the bond, when it was finally really posted, after the TRO was over, was then allowed, under the custom and rules of that court, to be withdrawn so that it served as no security and no guarantee of due process whatsoever, constituting a further violation of due process.

As noted in the earlier case before this Court, the plaintiff appealed this

matter to the D.C. Court of Appeals and raised all the constitutional issues and civil rights issues. But that court simply waited until the "extension" of the TRO was over and then declared the matters moot and dismissed the appeal as such, stating that no decision on the merits had been made. In their arrogance of their control of that court's processes for their purposes, the defendants Vo, Roseman, Otman and Jones, Day filed a show cause against the defendants, falsely accusing them of violating the TRO. But when plaintiffs herein used that to challenge the legal sufficiency and merits of the TRO, as is proper, that court denied that without comment.

B. COURSE OF PROCEEDINGS

After the plaintiffs below, Hoai and the Hemenways, filed their complaint in this suit against the defendants, all of the defendants moved to dismiss, prin-

cipally under Rule 12(b)(6) for failure to state a claim. Though filed as such dismissal motions these motions relied upon affidavits and extensive matter outside of the pleadings. (Vol. I, JA para. 82-400) The Sunoco defendants in the civil rights case, Sunoco and its lawyers who were responsible for the actions in the Superior Court also moved for sanctions. (Vol. I, JA para. 492-513) Their sanctions motion relied in part upon an assumption that Sunoco, and not Hoai, would win summary judgment in the PMPA case and castigated Hoai's PMPA case as being as meritless as the civil rights case was alleged to be. The attorney for Vo filed a sanctions motion as well which merely referred to that of the Sunoco defendants and invoked it, requesting the same. (Vol. III, JA p.1599, lines 15-17).

At the time, of course, the plaintiff Hoai was awaiting decision on his summary

judgment motion in the related PMPA case which, because of the earlier decision of this Court, he was confident, correctly as it turned out, he would win. Therefore, after initial, somewhat sketchy oppositions to these motions, plaintiff Hoai and his fellow plaintiffs, the Hemenways, moved for two stays. First they moved for a stay until the summary judgment in the related PMPA case was decided because it was clear that the resolution of that case would do much to answer the 42 U.S.C. 1983 question in particular, not only as to whether or not the use of the color and authority of the D.C. Court had violated plaintiff Hoai's PMPA rights but also other rights. (Vol. III, JA para. 1410-1439) Then, further study showed that the resolution of the question of the termination under the PMPA would also affect greatly the other civil rights claims, principally because it would establish

whether or not Vo was a mere scrambler or had any pretext to own the franchise. (Vol. III, JA para 1435-1441) These motions, which were filed in January of 1990, were obviously intended to obtain a reasonable pause between the time of deciding of the PMPA summary judgment motion in the related case and the finalization of the briefing on the dismissal motions in this case which were obviously in reality summary judgment motions and would have properly required conversion, including fact statements and the other safeguards of summary judgment. These stay motions were opposed but were never ruled upon.

Instead, after much time had passed, on October 1, 1990 the court below decided both cases on the same day. (Vol. II, JA, p. 786) In the PMPA case the plaintiff Hoai obtained his summary judgment and the cross-motion of Sunoco was denied. In the

civil rights case the dismissal motions were all granted and the court, citing the sanctions motions filed by Sun, Vo and Sunoco's attorneys, as an integral part of its order dismissing the civil rights case, gave the plaintiffs attorneys, not the plaintiff, a little short of three weeks to show cause why they should not be sanctioned although just what it was that violated either Rule 11 or Rule 28 U.S.C. 1927 was not specified. (Vol. II JA p. 786) Since the sanctions motions had been based in significant part upon the incorrect assumption that Sunoco would prevail over Hoai in the PMPA case this made it difficult to respond. (Vol. I JA p. 510, lines 10-14) The memorandum opinion itself was taken almost exclusively from the dismissal brief of the Jones, Day defendants, who had filed no sanctions motion at that time.

Immediately upon announcing the summary judgment for Hoai in the PMPA case the court held a status conference during which the court below invited Sunoco to file a motion before trial to limit the scope of the damages which Hoai might obtain as a result of his summary judgment on the question of liability in the PMPA case. This was done despite the fact that the PMPA, at 15 U.S.C. 2805(d) specifies that actual damages will be consistent with the federal rules which only allow such motions after trial.

When in this civil rights case the plaintiffs filed a rule 60 motion for reconsideration the Jones, Day defendants, seeing how the court was viewing things, joined with another sanctions motion. The Sunoco defendants filed a further request for sanctions in which they urged the court to assess the counsel for plaintiffs millions of dollars for talking to a mem-

ber of the oil trade press who called them about this case. (Vol III JA, p. 1636) On February 1, 1991 the court below held a hearing on the show cause which was part of the order and memorandum opinion being appealed and announced, among other things, in connection with its consideration on what it was going to do about the sanctions motions against the plaintiffs and the show cause which it had issued, that "I want to get this done. What was it that General Powell said ?" (Vol. III JA p.1592, lines 22-33) This, we ask the Court to note, was only a few nights after General Colin Powell, the United States Chief of Staff of the Joint Chiefs, had announced to the entire nation, in response to a question about the Iraqi army in Kuwait, that he was going to cut that army off and kill it. The court below's invocation of this statement was in response to a comment by the attorney for

the Jones, Day defendants who was seeking extensive sanctions against the plaintiffs' counsel resulting from his joining in after the show cause was issued as part of the memorandum opinion and order appealed from.

On the same day that the lower court decided both the PMPA summary judgment in favor of the plaintiff Hoai and the dismissal against Hoai and his two fellow plaintiffs, the Hemenways, and issued the show cause against attorney Hemenway and plaintiffs' counsel, the court also held, in granting the summary judgment motion to Hoai in the PMPA case, that all of the numerous outstanding motions at that time in the PMPA case were moot, without even mentioning individually what the particular motions were. Among these motions was a quite mild sanctions motion that the plaintiff Hoai had filed after this Court's interim appellate decision in that

PMPA case. For even though this Court made it clear at that time that the constant Sunoco argument that these other proceedings which were never concluded were res judicata or constituted collateral estoppel were not valid and even though the court below had rejected those arguments, Sunoco kept refiling papers containing the res judicata and collateral estoppel arguments. (Vol. I JA para. 507-509) Plaintiff merely asked that the defendant Sunoco be stopped from such filing upon pain of more severe sanction if they continued. Thus while this sanctions motion, based on decisions of the courts, was improperly held moot, a show cause without specificity was issued against the two counsel carrying the litigation at virtually the drop of a motion that was to some degree made obsolete by the PMPA summary judgment in favor of Hoai.

It was in the record in the PMPA case, and the court below knew, that Mr. Hemenway was not being paid and it was obvious that counsel for plaintiffs in this case was carrying the litigation whereas counsel for Sunoco stated in the record that he had been paid several hundred thousand dollars by his client, Sunoco. Vol. III JA p. 1575, lines 1-3.

C. RELEVANT FACTS

Because of the procedural nature of the underlying facts, involving as they did the misuse of a court's procedure, the above descriptions have incorporated many of the relevant facts. To those already spelled out we add these: it is highly relevant that it is a matter of record in other proceedings in other courts, such as the Superior Court, that the testimony was given in the presence of the Sun executive in charge of oversight of the gas station franchise in question, who himself cor-

roborated it, that the plaintiff Haoi had been threatened with death and violence and had signed the "one dollar" contract, which, it can be observed, is an altered and fraudulent document on its face under such pressure.[3] Further, the Jones, Day defendants were at the hearing in the Superior Court where these things came out on the record and where David Hemenway and Hoai testified to the violence against them in the gas station leading to the broken settlement and the court proceed-

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[3]The "one dollar contract" document bears the notation at the bottom of the first page that that page is page 1 of 2. At the bottom of the second page it bears the annotation that that page, by contrast, is page 2 of 3. Page three bears no such bottom pagination notation at all. In his deposition which is in the record in the PMPA case, plaintiff Hoai testified that he only ever saw the third page when he was compelled to sign the "one dollar contract". It is, in other words, a fraudulent document and is so on its face so that for an attorney to rely on it and present it to a court as the defendants here did, is unethical in addition to being evidence of lack of good faith and malice.

ings that gave rise to the instant cause of action.

The facts leading to the development of the cause of action in the Superior Court were these: On April 10, 1986 the plaintiff Hoai opened the Sunoco station in question, at 2305 Pennsylvania Avenue, S.E., Washington, D.C., as a Sunoco franchisee. Plaintiff Hoai had come to this country in 1976, and, after initial training by Phillips Petroleum he had worked for several years within one of the Sunoco companies, rising to manage, as an in-house employee of Sun, some five stations in this area. In 1981 he had negotiated to buy the station in question from its then franchisee only to be told by Sunoco not to conclude the bargain because the then franchisee was a problem franchisee who would be out of the station in a while and that Hoai could get the franchise later from Sunoco directly. Hoai then

opened another Sunoco station in Greenbelt, Maryland which he switched over successfully from another brand and improved tremendously in its sales. Vol. III JA, para. 1121-1391.

He worked in some other businesses not involving a gas station but related still to autos, all with his in-laws, and then in 1986 applied for the franchise in question, which had come open as promised. He was told by Sunoco's representative, Ernest Peele, that he would need approximately seventy thousand dollars or so to start up the station. He had available at the time, again through his family, about half that. As part of an elaborate scheme Mr. Vo, who fraudulently posed as a wealthy construction magnate interested in helping a fellow Vietnamese with a friendly loan, promised that he would lend Mr. Hoai the other half of the needed capital while Vo's colleague Thach and several

others got Hoai's capital tied up in another business, which was to be run by Mrs. Hoai, an oriental specialty food business. The representation of Vo, Thach and the two other Vietnamese who perpetrated the scheme, was that the money put into the inventory of the food business could be fed back into the gas station as the food was sold and generated income, and, indeed, for a while that happened. In the meantime, Vo claimed to be putting up his thirty-five thousand dollar loan by taking control, without announcing it beforehand, of the gas station's bank account and claiming he had put the loan in the bank account. As it turned out all that Vo was doing was putting the station's own proceeds into the bank account of the station and claiming he had made a loan. In fact he had put a few hundred dollars in. All of the station's proceeds Vo then claimed was his money. Soon a

check for a load of Sunoco gasoline, the first one in fact, bounced.

At this point the plaintiff Hoai requested Vo and Thach to leave his station and told Vo and Thach that he would get money from his family to buy out whatever they had really put in. At that time Vo and Thach tried to extract from Mr. Hoai and his family hundreds of thousands of dollars on the false pretense that they had put that much money into the business. When Hoai balked he was threatened with murder and violence. His family was threatened as well. Soon Hoai found himself excluded from his station by such threats. Soon after that he found himself excluded by the ongoing threat, along with his wife, who was running it, from the food business. As a result some forty-nine thousand dollars worth of cash and credit that would have to be paid was lost in the seized inventory, all of the capi-

tal that Hoai was planning to use to generate income through his wife's running of the food business in order to feed money back into the gas station business as Vo's "loan" was used for the early stages of the start-up.

Soon, Ernest Peele, the Sun area representative, wondered why Hoai was not in his own station and inquired of Vo what was going on. Vo claimed the station was his, a position which Peele repudiated firmly. Hoai was, as a result, soon told by Sunoco that he had better get back in his station and get it back from Vo, or lose it. Hoai tried to get his station back, beginning in the last of May, 1986 and early June, 1986 through the offices of a Vietnamese attorney, who, unfortunately, he found out in August, was working with the gang of people who were causing his problems. In August he fired that attorney and got Mr. Hemenway to take

up his cause, initially pro bono. It was then, August 25, 1986, that Mr. Hemenway composed a document which was simply a notice to surrender the premises of the gas station to Mr. Hoai, the rightful franchisee, had Mr. Peele of Sunoco certify on the bottom of it that Mr. Hoai was the legitimate franchisee and entered the station with Mr. Hoai and his son, plaintiff/appellee David Hemenway. They asked the employees who were there to leave and they did. Vo was not there at the time. As it happened there was in the station when they entered an off-duty police officer and other, on-duty officers soon arrived. So that there were there the entire time police officers, all of whom either testified, entered stipulations or filed affidavits that all was

calm and that there was no violence.[4]

There soon was arrived at between one Arif, the attorney for Vo who came to the station on that day of the 25th of August, 1986, and Hoai and the Hemenways, a settlement agreement, whose existence and terms have been acknowledged by both sides in the record in the Superior Court proceeding. Under this settlement it was agreed that Hoai and the Hemenways, with others of their employ, would stay in the station that night and the next day Ernest

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[4]Despite this, Sunoco and Vo and their attorneys have, in every proceeding in this complex of litigation, appellate and trial level both, falsely asserted that Mr. Hemenway entered the gas station violently in some way. Sometimes they are just knowingly false assertions of violence, sometimes they are clumsy reverse racist implications based on physical size. Most recently, in the February 1, 1991 show cause hearing in this case, defendant Forester asserted that Mr. Hemenway had entered the station with a false court document. This, as an examination of the document shows, is a completely false representation. But this Court will be told similar falsehoods, it can rest assured.

Peele, the Sunoco representative, would state which of the two, as between Hoai and Vo, was the legitimate franchisee of Sunoco. If it was decided in favor of Hoai, then inventory would be jointly taken and Hoai would pay Vo for any moneys Vo and his friend and colleague Thach had actually put in to the business.

The next morning early, while David Hemenway and plaintiff Hoai were in the station after having spent the night, Vo and seven others came to the station, where David Hemenway and Hoai promptly locked themselves within the station building. Vo and the others brandished a knife and threatened to kill David Hemenway and Hoai and the latter two could hear the other Vietnamese trying to break into the building. David Hemenway, as is a matter of record, dialled 911, several times.

The police came and the other Vietnamese turned all smiles. Soon John Hemenway and also Ernest Peele of Sunoco came. Ernest Peele asserted firmly that Thanh Vong Hoai was the only legitimate frachisee of Sunoco. Vo and his attorney made a brief pretext of taking the inventory but, instead of keeping the settlement agreement, without notice they went and retained the Jones, Day defendants in this case, who then filed, on August 28, 1986 the pre-emptive strike law suit that led to the present cause of action, with both a complaint and a motion for a TRO. The complaint was based on common law theories of conversion and interference with contract. (Vol. I JA p. 138) It made no mention of the PMPA. Substantial damages were claimed against Sunoco as the lead defendant and against all three plaintiffs herein secondarily.

The first deprivation of federal rights under the color and authority of the regulations and customs of the D.C. court began with the arrangement of the TRO proceeding. The time for the TRO was blocked out a day ahead, but attorney Hemenway was not notified until an hour or so before the hearing time at which time he was invited to the hearing as if it were a normal counsel situation in which he was expected to represent his client. Instead, when he arrived, he was greeted with a motion to disqualify him as counsel for his client so that he might not even represent plaintiff Hoai in the TRO hearing. This motion was made under the color and authority of the canons of ethics which have been adopted as regulations of the District by the District of Columbia Court of Appeals. Although this sort of thing is not allowed in most courts in the country, that is, the use of "sandbagging"

tactics to deprive parties of counsel without notice in preliminary stages of proceedings, misuse of these canons in the Superior Court in those years was, unfortunately, sometimes accepted in the Superior Court, as it was in this instance. Hoai was thus deprived of his counsel of choosing, and counsel Hemenway of his right to associate with and represent his client.

Thus, new counsel, the present counsel now threatened with large sanctions, was brought in for a re-start of the TRO hearing at 8:30 the following morning. The TRO hearing began, but had scarce gotten into the opening statement of the Jones, Day defendants, representing Vo as the plaintiff in that proceeding, when the TRO judge interrupted to state that she did not want to hear about anything but the possibility of the local tort of "wrongful eviction" being committed by the

defendants. Under this doctrine of case law in the District, a landlord may not evict a tenant except through the regulations and procedures of the Landlord and Tenant branch of the Superior Court. There was nothing in the original complaint or TRO motion about this doctrine or any violation of it. Though the Jones, Day defendants herein, in prosecuting that case, did not initiate the use of this local law to deprive plaintiffs herein of their federal and other civil rights, once the suggestion was made, they embraced the concept, amended their complaint accordingly and embraced the idea that local landlord and tenant law pre-empted the PMPA rather than the other way around in matters of termination and nonrenewal of franchises. No mention of the PMPA was made in the initial proceedings and when it came into discussion through the efforts of the present plaintiffs and they

in fact removed the case to the federal court based on it; the present defendants combined to remand it to the Superior Court.

The TRO required, as a specifically expressed condition precedent, that a bond of $3,500.00 would have to be posted in cash. It was never posted during the duration of the TRO for its ten days of life. (Vol. II JA para. 1097-1102) Instead, the defendant Ottman promised the TRO judge he would give an attorney's check for the bond. Instead, under the customs of the Superior Court, Vo wrote an NSF check drawn on the account of Hoai's gas station franchise. By the time the check was returned to Vo under the procedures of the Superior Court, the TRO's ten days were long over. (Vol. II JA p. 1100) At that point the defendant Vo was required to post cash for a short while but then, under the practices of the Court,

the defendant Vo was allowed to withdraw the bond and take it back, thus providing no security whatsoever for the individuals whose property or rights are wrongly taken, enjoined, attached or interfered with.

Ten days after the TRO was issued, the defendants in this case approached the Judge in Chambers of the Superior Court who, under then Rule 12-I(b), a local rule of that court, was entrusted at that time to have presented to him at any time, ex parte as deemed appropriate, any other matters appropriate for such disposition. They presented to him and got him to sign a "consent order" purporting to be an "extension" of the TRO with lip service that it only applied to the defendants Sunoco and Vo which took the station away from Hoai and gave it to Vo for seven months, in violation of the PMPA. (Vol. II JA para. 85-87) This was on September 8,

1986. Absolutely no notice was given by any of the defendants to any of the plaintiffs prior to this misuse of the local rule and the plaintiffs were not notified until after the consent order had been signed and the judge's signature obtained. The present law suit ensued.

III. JURISDICTION

Jurisdiction is under 28 U.S.C. 1291. The lower court's jurisdiction is based upon the civil rights laws and 28 U.S.C. 1343, 1331 and 2201 and 2202.

IV. SUMMARY OF THE ARGUMENT

The use made of the Superior Court Rule 12-I(b) without any notice or due process to deprive the principal plaintiff of his valuable gas station franchise in a Lugar-like fashion violates 42 U.S.C. 1983. In addition to due process the PMPA rights and other civil rights are violated. Private attorneys are not privileged like prosecutors when they ex-

ceed their traditional role and participate knowingly and willfully in violations of due process and the like.

To take the station of plaintiff Hoai and harm his agents for having testified and attended a TRO by the procedure employed to avoid subsequent testimony at what should have been a follow on full preliminary injunction hearing violated 42 U.S.C. 1985(2) the first four sentences. 42 U.S.C. 1985(3) was violated by the favoring of an extortionist, gangster-type individual over his innocent prey where his prey, such as the plaintiff Hoai, are the minority group members. It is a denial of the equal access to the regular courts of justice, as opposed to the private justice of the thug, that all are entitled to enjoy. Likewise to prevent enforcement of the gas station franchise agreement in the court by the acts complained of violates 42 U.S.C. 1981 in-

asmuch as white people would not have been subjected to such treatment by Sunoco, which would not have thought it could get away with it. The same is true for leasing and holding property where a violation of 42 U.S.C. 1982 is involved. The conversion from dismissal motion to summary judgment was erroneously handled so as to bypass, improperly, the summary judgment safeguards, such as time to bring in additional material and fact statements under the local rule. This is particularly erroneous where outstanding motions to stay were ignored which clearly would have required a pause. A show cause for sanctions was used here in an improper and erroneous manner as part of the dismissal memorandum so as to chill advocacy in an unacceptable manner in light of pronouncements by the court and manipulation by opposing counsel in this and related litigation.

V. ARGUMENT

A. 42 U.S.C. 1983

In its decision in Lugar v Edmondson Oil Co., Inc. (1982) 457 US 922, 102 SCt 2744, 73 Led2d 482, the Supreme Court decided three points which appellants Hoai, Hemenway and Hemenway contend are decisive in their favor in this case. First, Lugar decided that a prejudgment attachment statute of a state that enables prejudgment attachment without due process creates a 42 U.S.C. 1983 cause of action and, second, that such a cause of action may be pursued by the injured party against the private parties who took advantage of the unconstitutional procedures to attach the property. Third, Lugar established that even where the wrongful attachment was ultimately proven to be wrongful under state law, the fact that it was possible and allowable under the state procedures before it was decided under

state procedures that it was wrong did not diminish the fact that it was violative of 42 U.S.C. 1983 when it was used early in the proceeding.

Here a very similar type of ability to go further than just an attachment and actually take a property consisting of a valuable franchise and the rights and interests attached to it was demonstrated. The private parties who perpetrated the actions were sued without suing the court officials involved in any way. The regulations and procedures and customs and practices of the Superior Court were used completely prematurely and without due process to achieve the taking of the property from Hoai and the giving of it to the defendant Vo. Thirdly, as in Lugar the plaintiffs have maintained, since 1986, in the Superior Court that what was done here was wrong under D.C. law as well as under federal law but, unlike in Lugar they have

not been able to get any results and indeed some judges of that court have reinforced the wrongs.

Thus, if anything, the case here for these plaintiffs is stronger than it was in Lugar.

We think it evident that when you take a man's property ex parte and completely without prior notice there is a deprivation of due process. It is a matter now of res judicata in the related PMPA case that the station franchise belonged to Hoai and not to Vo and that it belonged to Hoai and was illegally terminated and not renewed by defendant Sunoco so that to the extent that the other defendants engaged in the actions of Sunoco, or joined in them, as those actions violated the PMPA then the plaintiff Hoai, and the other plaintiffs as his agents, were deprived of an important and valuable statutory right

under color and authority of District of Columbia law.

Further, the Superior Court is an Article I federal court. Therefore, since Hoai and the Hemenways appeared at the TRO hearing and testified and attended as parties and witnesses, to the extent that the gas station franchise was property of the plaintiff Hoai, in which the other two had an interest derivatively, and the defendants injured him in that property for the plaintiffs having testified as to the violence by taking it away from him in a manner that would risk no further such testimony, i.e., by proceeding ex parte, then important rights under 42 U.S.C. 1985(2), the first four sentences, were also deprived under the color and authority of the regulations, customs and practices of the Superior Court.

The bond procedure which provides completely illusory security violates due process.

The other federal rights violated which involve equal protection and intentional discrimination based on an invidious classification, will be discussed in their own context further on.

An attorney, such as plaintiff John Hemenway and a client, such as plaintiff Thanh Vong Hoai, have associational rights, particularly where Mr. Hemenway is helping Mr. Hoai pro bono, as was the initial case here. In Re Primus (1978) 436 US 412, 56 Led2d 417, 98 SCt 1893. They were violated here. Further, an act of using a law suit to seek redress, even as a defendant and counterplaintiff, is a first amendment right to seek redress by petitioning the court. City of Long Beach v Bozek (1982) 31 Cal 3d 527, 183 Cal Rptr 86, 645 P2d 137.

B. ATTORNEYS AS PARTIES

A side issue continually raised by these defendants is that the attorneys involved were merely acting in their normal course as attorneys and therefore cannot be liable under 42 U.S.C. 1983. There does not seem to be any Supreme Court case directly on point and there are many cases on the point that attorneys do not become state actors merely because they are officers of the court. But that is a chimera. There was never any contention here that private attorneys merely because they are officers of the court are, ipso facto, state actors so as to be liable under 42 U.S.C. 1983. Nor was there any contention that by employing the ordinary, constitutional processes of a court in a manner that does not violate federal law, private attorneys incur 42 U.S.C. 1983 liability.

The contention here is simply that as a factual matter the defendant attorneys knew perfectly well that what they were doing violated basic constitutional safeguards and should have known that it violated the PMPA rights of Hoai and his agents. Further, it is alleged that they did it maliciously and willfully which plaintiffs fully believe is shown by some of the facts set out above and others that can be proven. They do not have the qualified immunity that the common law gives to prosecutors.

It is quite clear that the Edmondson Oil attorneys in Lugar would have been as liable as their clients for the 42 U.S.C. 1983 violation. That is so under familiar principles of agency. Here, however, the attorneys involved went further. After all the D.C. Court had a pre-judgment attachment procedure, under Rule 64-I and

D.C. statutes that is properly used for such attachments and is surrounded and requires quite a sustantial bond. But these attorneys searched and connived to find rules and procedures of the court to bypass the safeguards of that rule and of Rule 65 which, like the federal law, requires a full hearing before a preliminary injunction can be issued.

Prosecutors had immunity at common law. The Supreme Court has held that a prosecutor enjoys absolute immunity from suits for damages under 42 U.S.C. 1983 when he or she acts toward initiating a prosecution and in presenting the state's case. Imbler v Patchman (1976) 424 US 409; 96 SCt 984, 47 Led2d 128. There is no record that a similar immunity extends to private counsel. Avoiding giving opponents and their clients the elementary notice required by due process is not the

normal function of an attorney acting in a private capacity.

C. 42 U.S.C. 1985(2)

The Superior Court is an Article I federal court. The first four sentences of 42 U.S.C. 1985(2) create liability for parties who injure a party or witness for having attended or testified in a federal court. No racial or otherwise invidiously discriminatory intent is required. Here the plaintiffs attended the TRO hearing and testified freely and fully as parties. Defendant Vo sat there and declined to testify to counter the uncontested testimony of the plaintiffs concerning the threats and attempts of violence by the defendant Vo. Plaintiff Hoai and plaintiffs Hemenway, as defendants in that proceeding, were promised twice by the TRO judge that there would be a full follow-on preliminary injunction in ten days. Obviously at that hearing there would have

been further testimony by the present plaintiffs on these matters of violence and threats of violence.

Obviously not wanting such testimony and in order to retaliate against the plaintiffs for having so testified, the defendants devised a way to harm plaintiff Hoai in his property, and also to harm his agents, by taking that property from him in violation of federal law.

D. 42 U.S.C. 1985(3)

Vo, along with others, was threatening the plaintiff Hoai with classical strong arm tactics and was, therefore, trying to be the law as far as Hoai was concerned, attempting to instill in him sufficient fear and deprive him of income to the point where he could not have effective equal access to the law to protect himself and rectify his plight. The other defendants in this case knew that this was going on and yet they joined with Vo and

gave him Hoai's gas station franchise, knowing that it would enable the rule of the strong arm by Vo over Hoai and the private alleged system of justice that such strong arm figures purport to dispense. In doing so they were fully aware that they were depriving Hoai of the ability to have a cash flow from his own business which would have given him the ability to fight Vo and Vo's tactics. This was their intent in fact as they carried out their conspiracy. They wanted to crush the plaintiff Hoai so that they then would be free to not have to face any possible restitution for their activities. They had observed that Vo was only interested in preying on other Vietnamese. Under this situation the other defendants' choosing Vo as a co-conspirator on the theory of "let them settle it among themselves", a theory which Sunoco fully admits in the record it was pursuing,

amounted to little more than a cynical calculation based on an estimate that members of the Vietnamese race could not obtain redress against the desires of such a strong-arm figure in their own community, a judgment in which the righteous Vietnamese are perceived as not worthy of receiving the justice and the equal protection of the laws of the overall American society. Instead, they are to be put at the mercy of such "justice" as the brigands within their community represent. Hoai in standing up against Vo and his colleagues, and the Hemenways in helping Hoai, are discriminated against invidously for racial reasons as much as those indefatigable plaintiffs in Hobson v Wilson (CA DC 1985) 737 F2d 1, cert den. 470 US 1084. Neither Sammy Abbot or Abe Bloom, for example, were black and neither of those gentleman was purely involved in assisting against minority discrimination.

Sammy Abbot was primarily involved in battling freeways, which had racial overtones and implications. Abe Bloom was against the Vietnam War which he thought had a racial component.

The famous language of Griffin v Breckenridge (1971) 403 US 88, 91 SCt 1790, is that the language of 1985(3) requires, "as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amdendment." (emphasis added). 403 US at 102. Here Vo, acting in a classic strong arm manner, sought to prey on his fellow Vietnamese and block his access to an effective remedy for the wrong Vo was doing him. "The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law by all." Id. at 102. Here the law secures to all of those of us who are not subject to such

predators within a relatively isolated ethnic group all of our rights. The aim of Vo clearly was that Hoai, as a righteous member of the Vietnamese community should not have equal enjoyment of those rights available to all of the larger community. The others joined in this by what they did. There is here a class-based invidiously discriminatory animus and it has a racial element that is not economic but rather grows out of a desire by Vo and his fellows to control and dominate their fellow ethnics of the Vietnamese community.

E. 42 U.S.C. 1981

What plaintiff Hoai and his two agents were doing in the Superior Court was seeking to enforce the franchise contract which the plaintiff Hoai had with Sunoco. Because of its choosing, however, to go with the strong-arm regime of Vo and give him the gas station franchise in violation

of the franchise agreement, Sunoco, and the others with it, were depriving Hoai of the right to enforce his contract, to give evidence, to be a party and to the full and equal benefit of all laws and proceedings for the security of his property as is enjoyed by white persons.

F. 42 U.S.C. 1982

Nor did the defendant Vo, and the other defendants with him, give Hoai the same right as is enjoyed by white citizens to lease and hold the franchise relationship, agreement and lease in this instance. Vo cut him off from this right because he thought that Hoai, as a Vietnamese, could be treated in this way and the larger, "white" world could not be reached by Hoai for assistance. The others joined with this conspiracy.

G. THE CONVERSION TO SUMMARY JUDGMENT

In this case the dismissal motion of the Jones, Day defendants including

several affidavits and contained much material from outside the record. The dismissal motion of the Sunoco defendants referred to matters outside of the record. In its opinion the court spoke of dismissing the case under Rule 12(b)(6) but in fact considered and entertained materials from outside the record.

Thus this was a summary judgment, not a dismissal. Under the circumstances here: no notice whatsoever of the conversion, a failure to allow any idea of an amendment to allow the actual underlying causes and factual issues to be brought out, this particular conversion does not meet the fairness test set out in Tele-Communications of Key West, Inc. v United States 1 Fed Rul Serv 3d 960, 756 F2d 1330 (CA DC 1985).

Even more unfairly, plaintiffs had moved for stays pending the outcome of plaintiff Hoai's summary judgment in the

related PMPA case. Obviously the intent of these motions was to allow a decent interval after the decision in it that the effects of that opinion could then be absorbed into the civil rights case proceedings in order that the effect in particular of it being found that the defendant Vo had absolutely no right to claim the gas station franchise which lack of any right is a necessary concommitant or inescapable corollary to the finding that Sunoco terminated and nonrenewed Hoai's franchise illegally by virtue of the consent agreement.

Although there are situations perhaps where short notice of the conversion is adequate, here there was none at all. The strict rule of this Circuit concerning the filing of specific statements of facts that the movant alleges are uncontested with the responding statement of allegedly contested facts under Local rule 108(h)

was ignored here. See Gardels v Central Intelligence Agency (CA DC 1987) 637 f2D 770; Tarpley v Greene (CA DC 1982) 684 F2d 1.

It is clearly as if the lower court did not want the full facts considered properly and no chance for amendment.

Rule 12(b) specifically requires that where the Rule 12(b)(6) motion matters outside the pleadings are presented to and not excluded by the court, then it is mandatory that the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. Rule 56 (c) then provides for a hearing after 10 days notice at least.

Under the 1946 amendments to the Federal Rules the committee notes stated of this conversion from Rule 12(b)(6) motions

to Rule 56 motions: "It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties will be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking party by surprise through the conversion of the motion into a motion for summary judgment." Thus the spirit and letter of the rules were ignored here.

H. CHILLING WITH THE SHOW CAUSE

The combination of factors in this case show that there is certainly an appearance that Rule 11 is not being invoked here for the purpose for which it was principally intended, i.e., the deterrence of the filing of papers in the court without having done adequate pre-filing inquiry. That is the primary purpose of the Rule. See Cooter & Gell v Hartmarx Corp. (1990) 110 SCt 2447, 2554. Yet,

here, plaintiffs counsel was limited in the court order ordering the show cause, the one appealed from here, to 45 pages. Then, at the subsequent oral hearing plaintiff's counsel sought to get his pre-filing inquiry into the record he was cut off from doing so by the court below.

Here, the pre-filing factual inquiry involved hours of investigation over many years, the key happenings are matters of public record which the counsel were familiar with, and the legal inquiry went to the cases cited herein and the law. There is no 1985(2) case like this one, no 1985(3) case and no such case under either 1981 or 1982. There are, however, no cases excluding what is sought here.

We think it evident that what was filed here was not subject for Rule 11 sanctions. The underlying facts and law here justified filing a complaint. The complaint was clumsily drafted. However,

as Judge Posner has pointed out, the Rule's purpose is not to penalize for inartful draftsmanship. In re Kelly (CA7 1986) 808 F2d 549, 552. The parties plaintiff, for reasons already discussed, anticipated that there would be an opportunity for submission of additional materials and amending the complaint accordingly because of the pending decision in the PMPA suit. That did not occur, of course. Instead the actions of the court below indicate that it either simply forgot about the outstanding stay motions to allow for such further work after the PMPA decision,[5] or its intention was to shape the litigation up by employing the show cause as a tool for that purpose. The chilling impact of the court's actions

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[5]Some credence is given to this possibility by the fact that at the February 1, 1991 hearing in this case the court below, at the outset, listed those motions as still outstanding and they have never, in fact, been ruled upon.

on plaintiffs and their counsel, objectively considered, is the same whichever it was, inadvertancy or conscious use of the rule and a show cause to shape the litigation up for purposes of calendar efficiency. The objective appearance is one of the lower court's granting a begrudging summary judgment in the PMPA case but immediately seeking to have the damages cut to a meaningless figure in that suit, while simultaneously using the unspecified show cause as part of the opinion appealed from here to chill any possibility that the plaintiffs in this case might continue to carry their case forward by threatening their counsel with a show cause (one of whom is pro se in the matter) and putting them to the burden of spending what time they could put in on the case defending themselves under difficult conditions.

Objectively considered, it does not seem that the reference at the February 1,

1991 hearing on this show cause to General Powell could refer to anything other than the general's famous remark, then just made and heard round the world, that he was going to surround, cut-off and kill the Iraqi army, just what he has done. Since there are no countersuits here, this remark can have only been aimed at the suits of the plaintiffs here. Rule 11 is intended to deter baseless filings according to the Supreme Court as cited above, not to cut-off, surround and kill litigation. Therefore, here the inclusion of the vague and unspecified and even confusing show cause in the appealable final order is itself appealable as part of that order, for the show cause is integral with the dismissal, is completely undifferentiated from it and establishes an effect which is absolutely chilling. Indeed it made counsel have to really go to great additional risk merely to file a

normal reconsideration motion, even though they felt they had solid grounds for doing so.

In a case from the ninth circuit, Judge J. Blaine Anderson criticized the use of the technique of imposing sanctions without notice and proper hearing pursuant to Rule 11 in inappropriate circumstances, using as an example a district court case from this circuit. Tom Growney Equip. v Shelley Irr. Development (CA9 1987) 834 F2d 833, 836. Criticizing Judge Green's decision in Rowland v Fayed (D DC 1987) 115 FRD 605, 608, Judge Anderson pointed out some of the dangers of not giving proper notice under Rule 11. We hasten to add that this is not a case such as Rowland where sanctions were imposed without notice. But we do point out Judge Anderson's observation at 836 on the lack of specification of the grounds of the Rule 11 show cause issued here. Judge

Anderson points out in that case that the appellate panel was "hard pressed, as we assume appellant must have been, to determine specifically, either before or during the subsequent hearing, the grounds on which the district court was relying...." Here there was no hasty imposition of sanctions without proper notice but there was a blanket show cause without any specification whatsoever, with a trigger of a little over two weeks and a page limit of 45 pages imposed by the order to explain that which was never specified.

In the complex of litigation surrounding Mr. Hoai's problems counsel have spent hundreds and hundreds of hours of legal research and factual investigation over a period of a number of years, all of which could qualify as pre-filing inquiry. When counsel tried to present this pre-filing inquiry at the February 1, 1991 hearing, as we have pointed out, counsel were cut

off, even though counsel pointed out that under one of the two second circuit cases most frequently cited in this circuit, prior work with the client counts as pre-filing inquiry so long as it lends itself to assuring a well-grounded and warranted filing. When we speak of fairness here, we stand on the decision by the Supreme Court in White v New Hampshire Department of Employment Security (1982) 455 US 445, 71 Led2d 325. Just as a fee motion in a civil rights case should not unfairly surprise or prejudice the party from whom the fee is sought we think the same applies in the court's use of Rule 11 show cause orders as part of dismissal grants.

Two second circuit cases are much cited in the cases in this jurisdiction on Rule 11. One that is particularly pertinent to the question of pre-filing inquiry is Oliveri v Thompson (CA2 1986) 803 F2d 1265. It also involved a civil

rights and one also that concerned abuse of authority, though in that case it was of police arresting procedures. In that case it was held that the attorney's experience and investigation, coupled with the client's story, was sufficient to justify bringing the case without it being sanctionable. Id. at 1278. Indeed the case here is much stronger than in Oliveri. For, in that case it was the client of the attorney against whom the sanctions were sought who proved out to be untruthful. In the Hoai litigation it has turned out that every time the plaintiffs have been allowed discovery they have been able to show that it is Mr. Vo who is not being accurate and, somewhat derivatively, Sunoco. As in that case also there are great difficulties in obtaining some information. Information about the Vietnamese plaintiff Hoai is standing up against is hard to come by for the simple

reason that many of the people with the information are reluctant to talk and others will not talk except privately but will not speak up in court. Some witnesses are now dead; one died and admitting while approaching death that he had been intimidated into changing his story. We point out to this Court that the standard set out in Oliveri is that "the court is to avoid hindsight and all doubt is to be resolved in favor of the signer. As we stated in Eastway, Rule 11 is violated only when it is 'patently clear that a claim has absolutely no chance of success.' 762 F.2d at 254." This circuit, we note, does not appear to have such a standard enunciated. But it is clear in this case that if there had been proper conversion of the dismissal motion, proper time to digest and apply the PMPA decision, and proper opportunity to look at the facts and amend, it would have been

readily apparent that the Lugar decision alone makes it clear that it is not the case that a the civil rights claims of these plaintiffs have absolutely no chance of success. As said in Eastway, the other second circuit case often cited in our jurisdiction, at the place cited:

> In framing this standard, we do not intend to stifle the enthusiasm or chill the creativity that is the very lifeblood of the law. Vital changes have been wrought by those members of the bar who have dared to challenge the received wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself. Courts must strive to avoid the wisdom of hindsight in determining whether a pleading was valid when signed, and any and all doubts must be resolved in favor of the signer. But where it is patently clear that a claim has absolutely no chance of success under the existing precedents, and where no reasonable argument can be advanced to extend, modify or reverse the law as it stands, Rule 11 has been violated. Such a construction serves only those who would manipulate the federal court system for ends inimicable to those for which it was created.

There is not the slightest assertion that this standard was not met here other than assertions of opposing counsel which do not turn out to be so when investigated.

What is particularly disturbing here is that the rule, objectively considered, is being used not to stop manipulation of the federal court system, but to assist the other side in doing just that, particularly the defendant Sunoco.

After this Court rendered its interim appellate decision in the PMPA suit, cited above, that became evident. For that intermediate appeal was necessitated by a motion made by Sunoco in that related case on February 9, 1988, cutting off the discovery of the plaintiff Hoai in that case before the scheduled date. This motion to dismiss the PMPA case was based entirely on arguments of collateral estoppel and res judicata, issue preclusion in other words. The motion was, as was later noted

in oral argument before this Court, weak and vague in its reasoning. It was denied without comment by the court below. It was at that time that the lower court in that case sua sponte stayed its proceedings on a theory of abstention, attempting to compel plaintiff Hoai to pursue his remedies in the Superior Court of the District, where he had not been the initiating party. When the intermediate appeal of that stay came up to this Court on the occasion cited, the record reveals that these same arguments of issue preclusion were tried repeatedly on the panel of this Court, so repetitively in fact that the panel had to remonstrate with the counsel for Sunoco several times that the issue preclusion arguments were not valid, at first politely and then more firmly.

Nonetheless, upon remand, the counsel for Sunoco continued to file motions and other papers with the Court in which he

continued to raise issue preclusion arguments. For instance, in its opposition to the summary judgment motion of the plaintiff Hoai in that case, a motion now granted, which was filed on April 7, 1989 the counsel for Sunoco filed some 15 attachments. One of them, as on numerous prior occasions (in fact every time he can get it in) was a copy of the TRO order of the judge in the Superior Court and it was accompanied by further issue preclusion arguments that the TRO was res judicata. Keep in mind that this was not only after the lower court had rejected this argument without comment and this Court had rejected it, but also after the District of Columbia Court of Appeals had rejected it. All the more remarkably, before most courts assertions that a TRO is res judicata and provides a collateral judicial estoppel would themselves be sanctionable.

Finally, on October 26, 1989 counsel for plaintiff Hoai in that case moved for sanctions for the continual misrepresentations to the court, including particularly the misrepresentation that the matters had already been decided in other forums because of such things as the long expired TRO in the Superior Court. This motion was never ruled upon by the court below until the October 1, 1990 date of the simultaneous opinions and decisions dismissing plaintiffs' complaint in this case and granting Hoai's summary judgment motion in the PMPA case. At that time, as part of the PMPA opinion granting Hoai summary judgment on liability all outstanding motions were denied as moot.[6] This, of course, was simultaneous with the issuance of the show cause in this case against

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[6]The opinion of the Supreme Court in Cooter & Gell, supra indicates that this would not be a correct decision though not directly on point.

counsel for plaintiffs, one of whom is also pro se. As the transcript shows, at the hearing on the show cause, on February 1, 1991 in this case, the counsel for Sunoco, echoed again by the counsel for Vo, repeated these same issue preclusion arguments again and again. In fact, the most prominent assertion, the record shows, of Sunoco counsel, was that "this litigation", without distinction between its various branches, must be stopped. The assertion was made repetitively that plaintiffs were bringing the same action over and over again and it had already all been decided. This is an untrue statement. No decision has been made on any suit against the present defendants except for the PMPA decision against Sunoco of partial summary judgment. No decision has been made against plaintiff Hoai except that his RICO suit, naming only Vo among these defendants, was dismissed in the

Eastern District of Virginia for an alleged lack of a pattern of racketeering activity, a technical requirement under that Act, before the Supreme Court struck down such use of that criteria to dismiss RICO suits in the summer of 1989 in the HJ, Inc. case.

Thus it can be seen that, despite losing on a baseless theory repeatedly, a theory that should have been sanctionable in the first instance, counsel for Sunoco, by virtue of simply ignoring pronouncements and holdings denying his issue preclusion argument, has simply kept making it and is succeeding in getting the court below to attack opposing counsel rather than himself. For whatever reason, he has succeeded with this tactic in persuading the court below, as part of this dismissal presently appealed, to chill the advocacy of plaintiffs' counsel and conceive of the litigation of the plaintiffs as being lit-

igation which ought to be treated like General Powell said he was going to treat Saddam Hussein's army. This, we suggest, is the manipulation of the federal courts warned of in Eastway, supra. And, for whatever reason, because of the lower court's fascination with General Powell, perhaps, or because of simple persistence, the manipulation has worked and is chilling the cause of the plaintiffs improperly. Therefore we ask this Court to consider this show cause as an integral part of the error in this dismissal order appealed from.

The Supreme Court, in its opinion in Browning-Ferris Industries, Inc. v Kelco Disposal, Inc. (1989) 109 SCt 2902, decided that the excessive fines clause of the Eighth amendment does not apply to curtail private jury awards deemed excessive by those suffering from them. The Court traced the history of that clause to

the amercements under the English Kings that were used to fine one party and control litigation by a sort of favoritism. To the extent that the court below itself participates in a one-sided policy that distorts the purpose of Rule 11 amercement may be what is being approached here.

CONCLUSION

The dismissal should be reversed and the cause remanded with instructions to allow a complete amendment of the complaint in light of the decision in the related case and any other relevant matters, after which a full briefing on summary judgment motions should be allowed only with all requisite safeguards and precautions to assure that there is no material factual dispute.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, a true and accurate copy of the foregoing Brief this 27th day of February, 1991, upon the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

John D. Hemenway

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Oral Argument scheduled for
May 13, 1991, 9:30 am

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS THANH VONG HOAI, DAVID HEMENWAY AND JOHN HEMENWAY

REPLYING TO

BRIEF FOR APPELLEES JONES, DAY, REAVIS & POGUE, MILLARD F. OTTMAN, JR. and DAVID C. ROSEMAN

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April 12, 1991

April 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

THANH VONG HOAI, et al.,	)	
Appellants,	)	
v.	)	USCA Number: 90-7170
THANH VAN VO, et al.,	)	
Appellees.	)	

TABLE OF CONTENTS

Table of Contents	i
Table of Authorities	ii
I. Reply to Jones, Day Opposition to 42 U.S.C. 1983 Claims	1
II. Superior Court Rule 12-I(b) and Due Process	6
III. Jones Day 1985 Opposition	14
IV. The New Claims Opposition	19
V. Procedure	20

TABLE OF AUTHORITIES

CASES	PAGE
Adickes v. S.H. Kress & Co. (1970) 390, US 144	5,6
Afshar v. Department of State, (CADC 1983) 702 F.2d 1125	3
Bellmore v. Mobil Oil Corporation, (CA2 1986) 783 F.2d 300	10
Bsales v. Texaco, Inc., (D.C.N.J. 1981) 516 F. Supp. 655	10
Golden State Transit Corp. v. Los Angeles, (1989) 493 US ___ 110 S.Ct. 444	11
Griffin v. Breckenridge, 403 U.S. 88 (1971)	15,17
Holt v. Castenada, (CA9 1987) 832 F. 2d 123, cert. den. 485 US 979 (1988)	14
Jackson v.. Metropolitan Edison Co., (1974) 419 US 345	6,7
Katz v. Morganthau, (SDNY 1989) 709 F. Supp. 1219	14
Lugar v. Edmondson Oil Co., (1982) 457 US 922	5,6,7,9
Maine v. Thiboutot, (1980) 448 US 1	11
O'Shea v. Amoco Oil Co., (CA3 1989) 886 F. 2d 584	10
Pennhurst State School and	

Hospital v. Haldemann, (1981) 451 US 1 — 11,12

Schwartz v. IRS, (CADC 1975) cited in Afshar — 3

United States v. El Paso Natural Gas Co., (1964) 376 US 651 — 3

Wilder v. Virginia Hospital Assn., (1990) 496 US ___, 110 L.Ed. 2d 455 — 11,12

Wright v. Roanoke Redevelopment and Housing Authority, (1987) 479 US 418 — 11

I. REPLY TO JONES, DAY OPPOSITION TO 42 U.S.C. 1983 CLAIMS

The opposition of the Jones, Day defendants (Roseman, Ottman, and the law firm itself, hereinafter, collectively "J/D") is more careful and articulate than that of Sun. J/D asserts that there are "substantive" "basic defects, which cannot be cured by amendment." Opp., p. 16. They then assert that there is a "heightened pleading standard" that has not been met. Id. In the end, their 1983 arguments, though more articulate and replete with many more citations, differ in some respect from from Sun's, but not so much as first meets the eye.

One argument J/D does not explain well at all is how, if a heightened pleading standard has not been met, there cannot be a cure by amendment of the alleged deficiencies in pleading. As has been pointed out in the reply to Sun's opposi-

tion, there was a great effort by the court below not to allow amendment. In this situation it is hard to see how J/D can be so certain that the alleged defective pleading cannot be cured. Further, J/D, in its motion to dismiss filed a number of affidavits and more than 300 pages of exhibits. (JA 78-400) Because that material was not excluded from the record and was looked to by the court below which referred to the material five times in its Memorandum decision (JA957) the motion was converted to one for summary judgment. Plaintiffs, having made motions to stay (JA1410 and JA1455) making clear that they expected further opportunity to deal with the motions to dismiss after the overlapping summary judgment decision then pending in the PMPA case,[1] motions which the court below appears to have simply ig-

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[1]See Section II in the reply to Sun's opposition.

nored, expected to submit countering materials and amend after the decision in the PMPA case, an opportunity plaintiffs were denied. Under these circumstances we do not think it is the case that amendment could not have cured any alleged defects. Certainly it is the case that it would be impossible to tell whether that is so with regard to the alleged failure to meet a "heightened pleading standard." If the failure is indeed one of not pleading enough detail and being conclusory then it would seem conclusory to assert that the defect could not be cured by following the normal course of allowing at least one amendment to fill in the allegedly missing allegations needed to support the conclusory assertions.

This would seem particularly important here where the record below shows the lower court adopted, almost without change, the findings and conclusions of

the J/D defendants as its own findings and conclusions, without any appearance of independent analysis (Memorandum Decision, JA956-963). Virtually the only change the court below made was to add the show cause in its effort to chill the advocacy of the plaintiffs and their counsel. (JA955) Up to this time, only Sun had filed a motion for sanctions. (JA932-951) J/D filed its Motion to "join" Sun in requesting sanctions on November 15, 1990, six weeks after J. Oberdorfer issued his "show cause." (JA991-1002). And this show cause did not contain any independent analysis apart from that submitted by J/D in the earlier filing. In effect it asked the plaintiffs and their counsel to show cause why they should not be sanctioned for daring to depart, in an unspecified manner, from that which was advocated by J/D. This Court has pointed out that it requires that a lower court's findings

enable it to discern the lower court's chain of reasoning. Afshar v Department of State (CA DC 1983) 702 F2d 1125, 1144, citing Schwartz v IRS (CA DC 1975). It cannot be said that there was any independent analysis here. The lower court simply incorporated the language of the J/D brief into its opinion and added the chilling show cause without additional explanation or reasoning. Little wonder that J/DS was encouraged then to file its own Rule 11 motion. This is not just a case of adopting findings of facts and conclusions of law supplied by J/D. This is a case of taking the J/D brief and using it virtually as the lower court's opinion. In Afshar this Court noted that such a practice is not to be rejected out of hand (United States v El Paso Natural Gas Co. (1964) 376 US 651, 656, 84 SCt 1044, 1047, 12 Led2d 12) but noted that it is:

> rarely the best approach because it tends to undermine the functions of such findings in aiding the trial court's own decisionmaking process and revealing that process to the reviewing court,...

The Court then noted that it will adopt the findings lacking such independent analysis if they are supported by the evidence. Here it would seem that the lower court was anxious to see that the evidence (of amendment, e.g.) would not be available to support its adoption of the J/D findings and conclusions without independent analysis. Under the circumstances this would <u>not</u> seem to be one of the rare cases where allowing parties on one side to thus determine the findings of fact and conclusions of law was appropriate. Indeed, it seems as if the lower court did not want this Court to be able to discern either its chain of reasoning or whether the findings and conclusions it accepted from Jones, Day were supported or not. Fortunately for the plaintiffs, such

things as Rule 12-I(b) of the Superior Court as it existed on September 8, 1986 (JA1674) are a matter of which any court may take notice and as such the disparity between the findings and conclusions submitted by J/D and adopted by the lower court without independent analysis and the lack of facial constitutionality of that rule's provisions for virtually unfettered ex parte decisionmaking are apparent despite this effort by the lwoer court. The rule was changed on 1/1/91 (JA1675).

Substantively, J/D urges that it shows in opposition that plaintiffs have not pled and proved that the defendants either deprived them of a right guaranteed by the federal laws and Constitution or did so under color and authority of the regulations and practices of the District. As to the later proposi-tion, J/D "proves it" by going back to Adickes v S. H. Kress & Co. (1970) 398 US 144, 152 and then coming

obliquely forward to Lugar v Edmondson Oil Co. (1982) 457 US 922. We reply that this is misleading. While the opinion in Adickes left room for doubt as to whether or not an active conspiracy with, or joint participation with, state officials was required, Lugar and many other 1983 cases since Adickes (now over 20 years old) have made it clear that usage of a state policy embodied in some rule or practice is sufficient to create the requisite color and authority of state law. Indeed the very point of Lugar was that the judge and the sheriffs were not sued, only the private users of the attachment procedure. There is not the slightest hint that the Sheriff and his deputies were in conspiracy with Edmondson Oil and unsuccessful defendants. Moreover, as here, the defendants in that case were alleged to have violated state as well as federal law. It was ultimately found by the state court itself in Lugar

that the pre-judgment attachment itself was not lawful under Virginia law and it was dissolved, but the damages remained.[2] The question remains one of whether this case comes under Lugar and J/D has not shown that no set of facts can be proven which would bring it under that caseholding on the point of acting under color and authority of D.C. law. The assertions that this Court earlier found that the agreement of the Superior Court consent order was purely a private agreement do not alter that picture for reasons given in the reply to Sun. It took years of effort for the plaintiffs to get to this Court and have that fact pronounced. Before that Sun and J/D, from sometime before September 8, 1986 on pretended to all and sundry that the consent order was a

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[2]For more on this point see the extensive reply to the similar point made by Sun in plaintiffs' reply brief to Sun's opposition, part I.

court order that must be obeyed as such. Their conversion comes too late. What is at issue is not what the consent order was ultimately found to be by this Court but rather what the defendants, including J/D acted under. That is the language of the statute.

II. SUPERIOR COURT RULE 12-I(b) AND DUE PROCESS

This brings us to the ingenious argument in this opposition concerning Superior Court Rule 12-I(b) as in effect at the time. Unlike Sun, J/D acknowledges the rule and the oblique reference to it even in the original complaint. However the J/D argument is that because the rule was so broad and vague it is not facially unconstitutional but is rather "neutral". Opp. pp. 20-21, 32-34. In support of this contention J/D seeks to steer the Court away from Lugar and to analogize this case directly instead to Jackson v Metropolitan Edison Co. (1974) 419 US 345, 355-57. In

Adickes the situation of the conspiracy alleged between the white employees of the Mississippi dime store lunch counter and the Hattiesburg police in and near the restaurant did not resemble the present situation where no conspiracy is alleged or relied upon. Similarly the Jackson analogy is inapt. In Jackson it was not an arm of the state, such as here its judiciary, that was involved, but rather a privately owned utility company. It is hard to see how the two things are analogous. The decision in Jackson specifically turned on the privately owned status of the utility. Lugar, on the other hand, as in this case, specifically concerns the use of the procedures of a state court as set by law. The use of Jackson here muddies rather than clarifies the waters. Nor does it stand for the proposition advocated by J/D that there is some kind of distinction between a govern-

ment entities having regulations that merely allow unconstitutional usage of the state's authority and are thus allegedly "neutral" and such regulations that positively mandate unconstitutional behavior. The procedure found unconstitutional in Lugar did not force Edmondson Oil to use it. Edmondson Oil chose to use the state procedure when it should have realized that it violated due process. Similarly, defendants here chose to use Rule 12-I(b) for the purposes of seizure of Hoai's franchise and damage to his property before judgment.[3] They obviously chose to use Rule 12-I(b) as it then existed in or-

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[3]Jones, Day's inclusion of Superior Court Rule 64-I at p. 2 and its attempted use of that rule here are misleading and irrelevant. Defendants did not even attempt to use that rule and it is not in issue. If they had so attempted, as we have pointed out in the reply to Sun they would have run into the pre-judgment attachment statute which it is pursuant to. That statute has narrowly prescribed safeguards which would have prevented what happened here.

der to avoid those safeguards as well as the safeguards of Rule 65. As we have pointed out in our reply to Sun, we do not think the proscription of Lugar can so easily be evaded. Obviously the Superior Court itself has realized the dangerous nature of the overbroadness of the rule as it then existed, because in the amendments to the Rule effective January 1, 1991 it eliminated the dangerously unconstitutional ex parte provisions and added the kind of specific safeguards contained in the attachment before judgment statute. (JA1675)

As to the contentions of J/D that there is no deprivation of federal rights here:[4]

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[4]Since Jones, Day did submit so much outside material with its Rule 12(b)(6) motion, thereby converting it into one for summary judgment, the real issue is not as Jones, Day and the lower court have expressed it, one of whether plaintiffs properly alleged a deprivation of federal rights but rather if there is any indication that the same actually occurred, even if the court below was partially successful in obscuring that possibility.

This is a somewhat incredible argument. Surely attorneys in one of the largest law firms in the country know quite well that when they seek out a loophole like then Superior Court Rule 12-I(b) so as to invoke the power of the court and at the same time avoid having to give the party who owns the franchise in question notice, they are violating that most fundamental federal constitutional right - due process, which, in the case of the district, is protected by the Fifth Amendment. Plentiful facts are alleged to show this violation and the complaint, (JA01-21) inartful as it may have been, alleges the due process violation in paragraph 7 (JA03) and in Count One paragraphs 43, 45 and 46. (JA17-18) In those paragraphs there is certainly an allegation of the First Amendment right to petition for redress being violated and there are sufficient facts alleged to show that by this

is clearly meant both the deprivation of Hoai's counsel of choice and of Hemenway's right to represent his client and press that client's petition for redress through the Courts without the use by defendants of the improper practice then obtaining in the Superior Court by which Judge's eliminated counsel without meaningful analysis on all sorts of pretexts. This was accomplished under color and authority of the canon in App. 4 adopted by the Court of Appeals, D.C. Code 1981 Ed. (Michie's) Rules, Vol. 1, p. 183.

Since Lugar clearly does establish the state action in this kind of use of state procedures to take or attach the property of others before judgment it is also clear that there is (because it is the D.C.) a Fifth Amendment equal protection violation here. It is hard to think of any more invidious classification than siding knowingly with criminals against their

victims and seeing that the processes of the state ensure the preference for the former over the latter.

We turn to the astounding claims concerning the violations of the PMPA rights of the plaintiffs, arguments rejected by the Supreme Court. The J/D argument on this topic seeks to confuse the Court into accepting that because, under paragraph 29 of the complaint the plaintiffs allege that Hoai has sued separately under the PMPA he does not sue for deprivation of his rights under it here.[5] The two things are not the same. It is one thing for a franchisee to sue the franchisor under the specific procedures of 15 U.S.C. 2801 et seq., namely 15 U.S.C. 2805(d) and another for that franchisee to sue the franchisor and others for violation of his civil rights. There is nothing in the PMPA in-

[5]The Hemenways' federal rights in this regard would be derivative from Hoai's.

dicating any intent on the part of Congress to pre-empt the federal civil rights laws of the reconstruction era, which were certainly known to Congress in 1978 when it passed the PMPA. The only preemption of any other law in that Act is of state laws, at 15 U.S.C. 2806 and it is quite narrow, being confined exclusively to preemption of grounds for termination at common law and of the notice requirements for termination. See Bellmore v Mobil Oil Corporation (CA2 1986) 783 F2d 300, 304; O'Shea v Amoco Oil Company (CA3 1989) 886 F2d 584, 593; Senate Report No. 95-731, 95th Cong., 2d Sess. 15, 17-19, Reprinted in 1978 U.S. Code Cong. & Admin. News 875-77. The courts have found certain procedural preemption of state law by the PMPA's procedural requirements. Id. and cases cited. The Bsales case even if it means what J/D says, is irrelevant here. The point of Paragraph 20 is precisely

that here Hoai does not sue Sunoco under the Act's narrow prescription; he sues all the defendants under the civil rights acts. So the fact that he could not sue J/D under the PMPA has no relevance. He has not attempted to do so and certainly did not do so in this suit.

The Supreme Court, beginning in 1980 with Maine v Thiboutot (1980) 448 US 1, 4, 100 SCt 2502, 65 Led2d 555, has decided a series of cases in which it made it clear that 42 U.S.C. 1983 proscribes deprivation of federal statutory as well as constitutional rights. The action will lie unless (1) the statute does not create enforceable rights, privileges or immunities within the meaning of 1983, or (2) Congress has foreclosed such enforcement of the statute in question in the enactment of that particular statute. Wright v Roanoke Redevelopment and Housing Authority (1987) 479 US 418, 423, 107 SCt

766, 93 Led2d 781. We have just seen that the only preemption in the PMPA is with regard to narrow areas of state law.[6] With regard to the possibility of the first exception: this was resolved against the argument of Jones, Day in Wright, supra and Wilder, supra, as well as in Golden State Transit Corp. v Los Angeles (1989) 493 US ___, 110 SCt 444, 107 Led2d 420, and Pennhurst State School and Hospital v Halderman (1981) 451 US 1, 19, 101 SCt 1531, 67 Led2d 694. A review of these cases reveals that the only exceptions to the general principle that the action will lie whenever a federal statute is violated are when the law in question was passed by Congress and the context of the entire

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[6]We note, as the Supreme Court has, that the inquiry about these exceptions is not the familiar four part test of Cort v Ash (1975) for determination of whether there is implied private right of action. Wilder v Virginia Hospital Association (1990) 496 US ___, 110 SCt ___, 110 Led2d 455.

statute and its legislative history reveal that Congress intended neither to create new substantive rights nor to require states to recognize such rights, where the provisions of the federal statute are hortatory and not mandatory. Wilder, supra 110 Led2d at 468. All of these exceptions involve federal laws impacting governmental units and the statute creates an enforceable right under 42 U.S.C. 1983 unless it merely prescribes a certain kind of conduct for the governmental unit or the interest which the plaintiff asserts under it is too vague and amorphous such that it is beyond the competence of the judiciary enforce. Id. at 467. None of that applies here. The PMPA creates, and specifically preempts the states with regard to, a narrow area of interstate commerce. It creates a new procedural system for franchisees as a nationwide class, a class defined in the Act, to have

the benefit of certain new substantive rights, rights pertaining to the new concept of "franchise relationship" which the Act defines. It defines new rights against arbitrary termination of the franchise or non-renewal of the franchise relationship or both and new rights for the franchisee also concerning the notice of termination or non-renewal which he must be given. It could not be clearer. The Supreme Court has spoken. This PMPA right of Hoai is a federal statutory right enforceable under 42 U.S.C. 1983. The PMPA was a statute designed by Congress to give assistance to franchisees against arbitrary termination and nonrenewal of their franchises and to give some content to their reasonable expectations of a continuing relationship with their franchisors unless the franchisors have a legitimate marketing and economic rationale for the termination or failure to renew

the franchise. Senate report, supra. That it could be used as a sword to deprive the franchisees of their right to sue under 1983 for deprivation of the rights it grants them would be to defeat its broad remedial purposes.

The J/D opposition to the 1983 count finishes with a bizzarre argument concerning libel and slander and the privilege that attaches against defamation in court proceedings. All of that is irrelevant here. There is no suit for libel and slander. The allegations of lying and false swearing here and so forth are only intended to show the bad faith that defeats any claim, however inarticulate, of privilege for private counsel akin to that granted to judges and prosecutors by the common law. There is no privilege against having one's bad faith shown when it is relevant.

An examination of the two 1983 cases cited on p. 36 reveals that they are not applicable. In Holt v Castenada (CA9 1987) 832 F2d 123, 125-26, cert. den. 485 US 979 (1988), what was at issue was the immunity of a witness against liability under 1983 for testifying. That would not seem to be relevant. No defendant here testified in the Superior Court proceeding except for Vo's having filed an affidavit and that is not sued upon as the cause of action. Again, however, its falsity goes to credibility and bad faith. Katz v Morganthau (SD NY 1989) 709 FSupp 1219 also concerns witnesses being sued under 1983 for testifying in a criminal prosecution and is not relevant here in that regard. It also involved suing the prosecutors under 1983. That is not relevant. The common law immunity of judges and prosecutors is not available to these defendants.

III. JONES, DAY 1985 OPPOSITION

The complaint, even with plaintiffs having been deprived, as set out in the reply to Sun, of a reasonable opportunity to amend it, clearly alleges violation of 1985, not just of 1985(3). With regard to both 1985(2) and 1985(3), however, J/D is correct in pointing out that there needs to be an element of racially discriminatory intent. We acknowledge that the complaint, which, as gone into in detail in the reply to Sun's opposition, part II, plaintiffs had reasonably anticipated an opportunity to amend, is not clear on this point. The theory of plaintiffs in this regard is very simple, and it is based on the Supreme Court's holding in Griffin v Breckinridge (1971), the same case relied upon by J/D. Hoai and Vo are Vietnamese. Hoai was being preyed upon by Vo with the use of the classic tactics of threat, including mur-

der and extortion, which have been an unfortunate concommitant of immigration to this country by virtually every sizeable ethnic group that has come here. Sun knew of this because it was told of it, as both Peele and Vaughn have acknowledged. J/D knew of it because J/D was there at the TRO hearing when the testimony of the threats and attempts of violence and the extortion came out and, indeed, Roseman and Ottman cross-examined Peele, Hoai and the Hemenways about it. Vo sat during the testimony and declined to contradict it by testifying himself. Another J/D attorney, Davidson, was present for part of the testimony, but left precipitiously when the violent threats and attempts were described. He subsequently left J/D and moved to North Carolina.

If J/D, in particular, had gone on and simply conducted a follow on preliminary injunction hearing under Rule 65 that

would have been one thing. But that is not what they did. Instead they conceived of a scheme under which they concerted with Sun and its attorneys to evade a Rule 65 preliminary injunction hearing and to prevent appellants from having an opportunity to testify in any way to prevent Hoai's franchise from being taken from him and given to Vo in violation of the Constitution and the PMPA rights of Hoai as described above. The effect of this, knowingly and intentionally, was to relegate Hoai, and those assisting him, to the private justice system of the rule of threat and violence within the Vietnamese community which Vo was seeking to create. We believe that a jury is entitled to decide whether or not this is treatment that would have been accorded an ordinary American whose ethnicity was long assimilated under similar circumstances. We think plaintiffs deserve to be allowed to amend

their complaint to articulate this theory better.

The theory involves both 1985(2) and (3) because it involves a conspiracy by two or more to impede, hinder, obstruct or defeat in any manner the due course of justice in the territory of the District of Columbia under (2) for the purpose of depriving Hoai of the equal protection of the laws (that is, the same protection that an assimilated American with no such private "justice" system preying upon him and his kind would have to face and also under (3) for conspiring to injure Hoai and the Hemenways in their property, consisting of Hoai's station franchise, and the Hemenway's attendant contract and employment rights, and for having exercised their rights or privileges as citizens in causing the illegal scrambler Vo to have to remove his thugs and hangers on from Hoai's station, and in standing up in

court and exercising their rights there. It is that simple. By joining with Vo, knowing the illegal nature of what he was doing, and by assisting Vo in his acts by using the Rule 12-I(b), there was a conspiracy to deprive Hoai of his equal protection under the laws and of his privileges and immunities under the laws. There was Fifth Amendment territorial action. There was as well, and it is articulated in the allegations of what was done, though not directly as such,[7] a violation of 42 U.S.C. 1981 by the interference with the enforcement by Hoai of his franchise contract and with the employment contracts of the Hemenways, and of their rights to sue, be parties, to give evidence and to the equal benefits of the proceedings in the Superior Court (as opposed to the private "legal system" of

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[7]This is done in the amendment proposed below under the relation back doctrine.

Vo and his extortionate compadres which the defendants opted for instead. This was indeed the effect of, and, a jury could find, the intent of the using of the ex parte procedure. Further, under Section 1982 the same events interfered with the right of Hoai to lease and hold the real and personal property embodied in the franchise, and for the Hemenways, through him, the same.

The passage from Griffin which both sides rely upon is this:

> The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or otherwise class-based discriminatory animus behind the conspirators' action. The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by law to all. (footnotes omitted, emphasis in the original)

No right is more fundamental, among those secured by the law to all, than the access to the law itself. It is the foundation for all other rights, without which

those rights would not be enforceable at all and would be as hollow as the glorious sounding rights ostensibly granted in constitutions of the Eastern bloc, where every day there is greater testimony to their total uselessness without a full system of courts governed by the rule of law. The private "system of justice" offered by the Vo's of the world who prey upon their own ethnic kind seeks to discriminate against its victims in the most invidous way of all, by cutting off access to the courts that the rest of us enjoy, by maneuvers such as this which make a mockery of due process and champion the rule of the brutal, outlaw aggressor over the legitimate rights of the law-abiding within that ethnic group. Those who concert and conspire to aid one such as Vo know the effect of what they do and their animus is to join in that deprivation of equal rights, to favor the strong man who

blocks equal access to justice for his own people. Just before this passage the Court says:

> giving full effect to congressional purpose -- by requiring, as an element of the cause of action, the kind of invidously discriminatory motivation stressed by the sponsors of the limiting amendment. (emphasis added) See the remarks of Representatives Willard and Shellabarger, quoted supra (emphasis in original), at 1797.

This is precisely what plaintiffs allege is the case here. An element of the cause of action is indeed just that kind of invidously discriminatory motivation. We are not talking here about depriving of a particular right under the law, as with 1983, rather we are talking about any access to the law the rest of us enjoy at all. To see this it is only necessary to advert to the remarks of Representative Shellabarger referred to, viz.:

> "... that any violation of the right, the animus and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights,

shall be within the scope of the remedies of this section." (emphasis added)

It seems to plaintiffs that this replies to the contentions of J/D better than anything plaintiffs can say. For we think that a jury may, and is entitled to, decide that what the defendants intended, their animus, and what they effected, was precisely to "strike down" Hoai, to the end that he might not enjoy that equality of rights he should have been able to enjoy along with all other Americans, full and unhindered access to the Court to enforce his franchise agreement and then to have been able to operate for the rest of his life with his friends the Hemenways to assist him in that endeavor.

IV. THE NEW CLAIMS OPPOSITION

We reply that, under the circumstances gone into in the reply to the Sun opposition, part II, it is important for the Court to realize that there easily could

be a properly curative amendment. There is no attempt to make that amendment part of this appeal. Similarly the 1981 and 1982 claims are substantively alleged in the first complaint, which is part of the appeal.

V. PROCEDURE

We do not find Roseman's affidavit as innocuous as argued. It is an affidavit outside the record, regardless of the attempt to downplay its substance. Further its selections of matters from other records were not complete and were taken misleadingly out of context in many instances. They were not certified and if plaintiffs had been allowed to answer them fully the plaintiffs would have to do a lot of work and submit a lot of additional documents to make sure the distortions thus introduced were corrected. They were not given the chance. This is a classic example of a large firm using its large

photocopy machine to seek to win the day by preventing proper focusing on the merits. None of the three cases cited by J/D for looking beyond the record without going to summary judgment involved anything such as the "big xerox" technique used here. The first involved no extraneous documents other than letters incorporated in the complaint. In the second notice was taken of a man's judicial commitment to St. Elizabeth's. In the 9th Circuit case note was taken of complete records from the state administrative body whose decision was being appealed. None of the three cases (p. 45) involved the distorting dumping technique used here.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, two true and accurate copies of the foregoing BRIEF this 12th day of April, 1991, upon each of the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

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John D. Hemenway

Oral Argument scheduled for
May 13, 1991, 9:30 am

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

RECORD NO. 90-7170

THANH VONG HOAI, et al.,

Appellants,

THANH VAN VO, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS THANH VONG HOAI, DAVID HEMENWAY AND JOHN HEMENWAY

REPLYING TO

BRIEF FOR APPELLEES SUN REFINING AND MARKETING COMPANY, J. GORDON FORESTER, JR., JEFFREY WAGNER AND JOSEPH ZULLI

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April 12, 1991

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THANH VONG HOAI, et al., Appellants,	)	
v.	)	Record Number 90-7170
THANH VAN VO, et al., Appellees.	)	

TABLE OF CONTENTS

Item	Page
Table of Contents	i
Certificate of Service	ii
List of Authorities	iii
I. REPLY TO SUN'S OPPOSITION TO PLAINTIFFS' 42 U.S.C. 1983 CLAIMS	1
II. PROCEDURAL QUESTIONS: CONVERSION TO SUMMARY JUDGMENT WITHOUT OPPORTUNITY TO AMEND OR SUPPLEMENT; NO FACT STATEMENT; IN THE FACE OF OUTSTANDING MOTIONS TO STAY	13
III. THE 42 U.S.C. 1985 COUNT	18
IV. CHILLING WITH A SHOW CAUSE	20
V. PRAYER FOR RELIEF	20

CERTIFICATE OF SERVICE

I hereby certify that I have served by U. S. mail, first class, postage prepaid, two true and accurate copies of the foregoing Brief this 12th day of April, 1991, upon each of the following : J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis & Pogue, 1450 G Street, NW, Washington, D.C. 20005.

_____

John D. Hemenway

UNITED STATES COURT OF APPEALS
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THANH VONG HOAI, et al., Appellants, v. THANH VAN VO, et al., Appellees.	)	Record Number 90-7170

TABLE OF AUTHORITIES

Item	Page
District of Columbia v. Air Florida, Inc. (CA DC 1984)	16
Donaldson v. Clark (CA11 1987) 819 F.2d 1551	16
Gardels v. Central Intelligence Agency (CA DC 1980)	16
Lugar v. Edmondson Oil Co., 456 US 922, 102 S.Ct. 2744	2
Parratt v. Taylor, (1981) 451 US 527, 101 S.Ct. 1908	14
Thompson v. Evening Star Newspaper Company (CA DC 1968)	16

OTHER AUTHORITIES

D.C. Code 1981 (Michie) Rules, Vol. 1, p. 183

Lexis/Nexus Report on January 1991 press conference of Gen. Colin Powell

394 F.2d 774

Certificate of Service ii

List of Authorities iii

I. REPLY TO SUN'S OPPOSITION TO PLAINTIFFS' 42 U.S.C. 1983 CLAIMS 1

II. PROCEDURAL QUESTIONS: CONVERSION TO SUMMARY JUDGMENT WITHOUT OPPORTUNITY TO AMEND OR SUPPLEMENT; NO FACT STATEMENT; IN THE FACE OF OUTSTANDING MOTIONS TO STAY 13

III. THE 42 U.S.C. 1985 COUNT 18

IV. CHILLING WITH A SHOW CAUSE 20

V. PRAYER FOR RELIEF 20

IN THE UNITED STATES COURT OF APPEALS
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THANH VONG HOAI, et al. Appellants,	)	
v.	)	USCA Number
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THANH VAN VO, et al., Appellees.	)	

I. REPLY TO SUN'S OPPOSITION TO PLAINTIFFS 42 U.S.C. 1983 CLAIMS

The opposition of the Sun defendants (Sunoco, Forester, Zulli, Wagner, hereinafter, collectively "Sun") to plaintiffs' 1983 claims center around an alleged failure to have the requisite involvement with the color and authority of state (D.C.) law. Sun's opposition ignores the use made of the rules, canons and practices of the D.C. Superior Court by defendants to achieve the seizure of plaintiff Hoai's property and deprive him and his agents, the Hemenways, of federal rights. Instead, Sun points to the fact that defendants used the facially unconstitutional provision of Superior Court

Rule 12-I(b) as then existing, along with other rules and practices of the Superior Court, to violate, ultimately, D.C. law as well, as a shield against 1983 liability. Under this argument, parties may use unconstitional and federally prohibited rules and practices of a state court, if they are also careful to violate other state law (As ultimately found, provided the damaged party can survive long enough and fight hard enough.) We disagree. Plaintiffs read Lugar[1] to hold that even when the damaged party may eventually be vindicated under state law, if, in the meantime, the court's regulations and procedures provide for the attachment, or, as in this case, (even stronger,) the seizure of another's property in violation of due process and other federal rights, then private parties are not free to use those

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[1] Lugar v Edmondson Oil Co. 456 US 922, 102 SCt 2744, 73 Led2d 482

procedures without incurring potential liability under 42 U.S.C. 1983, particularly should they do so maliciously.

Sun would have this Court believe that what it did was what any attorney and client would do. The allegations of the complaint make it clear that plaintiffs believe otherwise. Ordinarily attorneys and their clients, using the ordinary processes of the Court, do not connive to use its facially unconstitutional rules and practices to undermine the very law that same court system is supposed to uphold -- state or federal. Superior Court Rule 12-I(b) (JA 1674) as then in effect, provided an opening which those bent on violating the federal and constitutional, (and D.C.) rights of others could drive a truck through. And that is what happened here. Faced with the possibility of a full preliminary injunction hearing which would have reversed a TRO which was itself ob-

tained by the use of some rules and customs of questionable validity (though the TRO procedure itself was not and is not alleged to be part of the 1983 violation) and would have allowed the testimony of Mr. Vo's extortion and threats of violence and murder to defeat the taking from Mr. Hoai of his station, the defendants found the device of Rule 12-I(b) and, bypassing any form of trial or hearing, were able to use the Superior Court's ex parte provision in that rule, a provision surrounded with no safeguards whatsoever, to carry out their scheme to attempt to make sure that without trial they could so damage Mr. Hoai and those who might assist him that there would be no hearing or trial. JA p. 389-390, paras. 39-45.

What Sun attempts here is a sort of Hobson's choice. On the one hand, Sun says, there was no involvement with the

state sufficient to create a 1983 cause of action because the attorneys and their clients knew they were violating the law. (Opp., pp. 9-10) On the other hand, even if there was involvement with the state it was only attorneys going about their normal business. (pp. 14-16) The plaintiffs point out in reply that this argumentation of the opposition has a straddling quality to it. If the allegations of the complaint are accepted[2] then the defendants were not just attorneys with their clients going about their normal business. But, says Sun, it is the allegations that the defendants were purposefully violating the defendants' federal rights, and their D.C. rights as well while they were at it, that show that there was no color and authority of state law involved. Under this theory of 42 U.S.C. 1983 jurisprudence, the wrongdoers

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[2]See below part II.

who purposefully find a facially unconstitutional procedural provision in the rules of a state court by which they may maliciously bypass both federal and state law to seize the property of their victims without benefit of hearing or trial and harm those victims severely while they are at it, may not suffer liability under 1983. They have an airtight system for violating federal rights by the use of state law. By using the state court procedures and manipulating the personnel, (D.C. judges and staff of the Clerk's office in this case,) maliciously and knowingly they insulate themselves against being liable for the violation of the federal and local rights under the color of the state court's rules and practice such as Superior Court Rule 12-I(b) even if that rule was at the time unconstitutional on its face. But if challenged, should the victims survive and be able to fight,

the wrongdoers can just assert that they were merely attorneys and clients doing their job. Plaintiffs submit that neither the theory that consciously wrongful use of facially valid regulations and practices nor Sun's theory (not candidly articulated as such) of absolute immunity for private attorneys and their clients who are consciously misusing local court regulations and practices to knowingly deprive others of federal rights will survive scrutiny under the cases of recent years.

In opposition Sun quotes Lugar for the following proposition:

> Not only must the plaintiffs be deprived of their rights under color of law, the "...party charged with the deprivation must be a person who may fairly be said to be a state actor." Opp., p.7

The Court will note that the immediately following sentence, which applies directly to this case, is omitted by Sun, viz.:

> This may be because he is a state official, because he has acted together with or has obtained aid from state officials, or because his conduct is otherwise chargeable to the State. (Lugar 457 US at 937)

Sun skips over this passage, which is the one really at issue here, and goes on to talk about the preceding sentence without the following one as a limit. Then Sun segues into a passage (opp. p.8) which acknowledges that Lugar was a case where "a private party jointly participates with state officials".[3] There follows a diminuendo in which it is not really explained why that was not the case here. There is merely the characterization that Lugar followed a long line of attachment cases -- as if that explained something.

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[3]In the Court below, where the record in this and the companion case shows Sun has great control, it shows that Sun argued that the wrongdoers had to be state officials or in conspiracy with state officials. JA 446-50. Apparently it feels that at this level its diversion tactics have to be cleverer, at least at first, as will be seen at p. 10 of the opposition.

No effort is made to explain why this is not a similar situation. It may be noticed that D.C. has a pre-judgment attachment statute and rule. But they have safeguards, such as hearings and due process, and did not provide the opening that Superior Court Rule 12-I(b) did. It is Sun's contention that if one can find state court rules and practices which aren't labelled "pre-judgment attachment" and can use them to effect an attachment, or, as here, an outright seizure, of a man's property without benefit of hearing or trial, then it's OK. Plaintiffs reply that if the set of rules and practices at issue has the effect of enabling the malicious user of it to take the property without hearing or trial long before the same can be reached then it is a Lugar situation, regardless of what it's called. The use of a facially unconstitutional provision to effect a pre-judgment seizure

in violation of due process, of PMPA rights, and other rights in avoidance of, a legitimate pre-judgment attachment procedure with safeguards, is a fortiori a greater infringement upon the prohibition of 42 U.S.C. 1983, not a "safe harbor". Sun may not escape the Rule of Lugar by such sophistry.[4]

After "sliding off" the meat of this issue, (p. 8) Sun asserts "plaintiffs complain of the issuance of a Temporary Restraining Order followed by a consent order." This, plaintiffs believe, is designed to mislead. Plaintiffs do not complain of the TRO per se as a violation of 42 U.S.C. 1983 though, for reasons going to the motivation and intent of the defendants, plaintiffs believed it necessary to assert the wrongs used to obtain

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[4]We note that Sun nowhere mentions or discusses the actual language of the Superior Court Rule in question, not even listing it in its list of authorities.

the TRO. It was the "extending" of the TRO through the facially unconstitutional judge in chambers rule that violated 1983 and is the linchpin of this action. Sun seeks to implicate the Court in a sort of misleading rhetorical "wink" that plaintiffs are attackers of the court processes as such. That is not the case. We say that the use of the court's normal process, regardless of false swearing and like having been used to obtain the TRO, violates 1983.

We say that the use of the unconstitutional rule violates 1983 and that, coupled with the use of the canons of ethics as adopted by the D.C. Court of Appeals[5] to "sandbag" Mr. Hemenway as was practiced then by Superior Court judges, violates 1983, that the use of the D.C. L & T law to override Plaintiff's PMPA

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[5]D.C. Code 1981 (Michie) Rules, Vol. 1, p. 183

rights, the use of the practice of allowing "payment" of supposedly preconditional bonds with checks that can easily be NSF (in this case drawn on the empty account of the seized business, an account set up and controlled by the wrongdoer himself, JA pp. 1100-02) violate 1983. We admit that these matters were not specified in the complaint, whether that be a failure to plead evidence or a failure to meet heightened pleading requirements.

But we point out that: A) Plaintiffs had moved for a stay pending the resolution of the related PMPA litigation before the same judge (JA pp. 1410 et seq., 1435 et seq.) so that they might supplement and amend once the matter of the PMPA rights of plaintiffs was resolved by the then pending summary judgment in the PMPA case, which were never ruled upon, and B) the court below converted from dismissal mo-

tions to summary judgment motions without allowing any opportunity after the PMPA decision for the contemplated amendment and supplementation and without requiring any Local Rule 108 fact statement from the movants and did so on the same day as the summary judgment in favor of plaintiff Hoai was granted in the PMPA case. Later, in a hearing on the record in this case below the lower court candidly revealed its motivation (JA 1592, lines 22-23) as being the same as that expressed by General Colin Powell which he had stated on CNN to a watching world just a few days before -- to cut off and kill what Sun was describing as all the litigation of Mr. Hoai.

Sun implies, without articulating, an immunity for private counsel and their clients akin to the traditional common law immunity for judges and prosecutors. We disagree. This was not the normal use of Superior Court procedures. It employed fa-

cially invalid rules and practices in bad faith. The single district court case cited by Sunoco does not provide sufficient grounds to justify the decision of the lower court here, on a dismissal motion converted to summary judgment without proper follow through procedures, that normal court process were being followed and that it was simply a resort to the court's processes.

At the bottom of p. 8 Sun quotes from this Court's decision on the intermediate appeal in the PMPA case of Mr. Hoai. Then, on the following page Sun, ignoring the Supreme Court's holding in Lugar, asserts that 1983 requires 14th Amendment state action and that there was none of that here. The thesis is that because this Court earlier ruled that the consent agreement was but a private agreement between the two sets of defendants here, it cannot have been state action. Plaintiffs

reply that it is the essence of 1983 violations that acts which are not properly state actions are clad, falsely, as actions of the state. This was one such. Some state actions involve actual state officers exceeding any legitimate authority granted them by the state and thus wrongfully "going private." Others, such as here, involve private parties making use of legitimate state actors for illegitimate purposes, purposes which are invalid under the federal Constitution and laws, because of regulations and practices which enable such usage. Sun seeks to confuse the two types. The state officials in Lugar who served the attachment pursuant to the unconstitional attachment statute and procedures were no different than Judge Eilperin of the Superior Court here. But he is immune; these defendants

are not.[6]

We should like to point out the misleading nature and essential inaccuracy of statements on pp. 11-12. It is represented that Rule 65 provides for a hearing upon two days notice where there is an ex parte notice and that instead of invoking this rule Mr. Hoai appealed the consent order. This deliberate confusion of the rule regarding ex parte TRO's with what happened here with a consent order executed by the Superior Court judge under the unconstitutional judge in chambers rule, the Court may recall, was also attempted by this same counsel in the PMPA case and was there rejected by this Court. Rule 65 procedures were not misused here by the defendants, the judge in chambers

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[6]It seems particularly inappropriate that in a case where intent of the defendants is so crucial a factor, there should be the conversion de facto to summary judgment and a decision in summary judgment without even a fact statement.

rule procedures were. Under Rule 65, had it been invoked properly, all parties would have had to have been notified and to have signed off on any consent order which, under federal case law, is clearly a conversion of a TRO into a de facto preliminary injunction. Use of Rule 65 was avoided by defendants precisely because its safeguards would have foiled their scheme.

The Court will recall and notice that in its earlier decision on the PMPA case intermediate appeal on the abstention question this same counsel attempted to convince it of the falsehood that Mr. Hoai was responsible for the action in the Superior Court in some way and that therefore Mr. Hoai could not pursue his federal claims in the court below and that Mr. Forester did so repeatedly in that intermediate appeal in both filings and oral argument and that this Court had to point

out to him, which is in the record, that Mr. Hoai had not pressed his federal claims in the Superior Court until absolutely compelled to do so by the combination of the inaction of the Superior Court, the treatment he received there and the stay of his claims without proper analysis by the court below. The Court should not then be surprised at these continuing misrepresentations and attempts to mislead.

Thus the Court should not be surprised that Sun repeats its now thoroughly rejected preclusion argument. A TRO is not res judicata and cannot effect collateral estoppel. Yet Sun makes that argument over and over again. It pled those defenses in the PMPA case and moved to dismiss on that basis. The lower court denied that motion without analysis or comment and, without proper analyis, sua sponte, entered a stay based on the ab-

stention doctrine. Sun nonetheless continued those arguments before this Court in the ensuing intermediate appeal in the PMPA case and was firmly rebuffed. On remand it continued to raise the arguments in filing after filing and does so in filings and oral arguments to this day. Plaintiff Hoai's motion in that case to have this continual baseless use of these preclusion arguments sanctioned and stopped was ignored by the court below and simply dismissed as allegedly moot without comment when the summary judgment mandated by this Court's earlier decision in that case was finally granted by the court below. Even earlier, as Sun acknowledges, the D.C. Court of Appeals had ruled that there was no decision on the merits in the Superior Court case. Sun acknowledges that the case is stayed -- and yet continues, as here, to argue preclusion. In the oral hearing before the D.C. Court of

Appeals Judge Reilly in particular, was somewhat incredulous when informed that Sun was doing this continually. He inquired as to why other courts did not just tell Mr. Forester that this was not so as a matter of law. Sun has still not stopped this baseless assertion.[7]

Finally, it should be noted that the last sentence of Sun's 1983 opposition is another misleading "tag line" presented without analysis or support in the hopes that if enough irrational and misleading

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[7]It should be further noted that it is a matter of record in the Superior Court proceeding, admitted to by Vo's attorney, Michael Arif, that Vo, through Arif, had settled the matter in its entirety by agreeing to abide by the decision of Sun's Mr. Peele as to who was the franchisee. Peele's decision was that Hoai was the franchisee. See record of arbitration at JA 624 et seq. The transcript of the Peele arbitration was ratified at Peele deposition JA 1705-1708. Filing such a pre-emptive strike suit in violation of a valid settlement agreement, agreed to by both Vo and Sun, was itself a sanctionable act. Not only did Mr. Vo file suit first and initiate all of these events, he did so baselessly and was then effectively joined in that baseless effort by Sun.

assertions are thrown out some will stick, a technique which has worked admirably for Sun in the lower court. Obviously there was no wrongful eviction found in the Superior Court as the merits have yet to be decided. Further, the decision by the lower court on Mr. Hoai's PMPA claims, (JA 964 and JA 979) compelled by the earlier appellate decision of this court, made it clear that there was no wrongful eviction by Mr. Hoai. For Hoai was the franchisee and was terminated by Sun on September 8, 1986. That is now res judicata by the lower court's summary judgment. Then Vo was, in Prosser's phrase, a "mere scrambler" and wasn't wrongfully evicted. It is now clear that by virtue of the illegal termination it is Sun that wrongfully evicted Hoai under that tortious doctrine in the District. It is this sort of thing that caused plaintiffs to move to stay the decision on the dismissal motions of

defendants until the resolution of the PMPA summary judgment motions.

II. PROCEDURAL QUESTIONS: CONVERSION TO SUMMARY JUDGMENT WITHOUT OPPORTUNITY TO AMEND OR SUPPLEMENT; NO FACT STATEMENT; IN THE FACE OF OUTSTANDING MOTIONS TO STAY

Plaintiffs filed the complaint as the statute of limitations was about to expire while the lower court was taking over a year to decide their summary judgment motion in the PMPA case. Hoai's PMPA summary judgment motion was filed in March, 1989 but wasn't decided till October 1, 1990. Forced to file a complaint whose allegations were necessarily going to be reshaped by what was later decided on the liability question in the PMPA case, plaintiffs moved to stay the resolution of the 1983 count pending the PMPA outcome, and then to allow for consideration of the impact of that then pending decision on the 1985 count. JA 1410 & 1435. In light of the impact of the issues in the PMPA

case, where Sun had cross-filed for summary judgment, this was logical.

Not only did the resolution of the PMPA claim establish unequivocally the violation of Mr. Hoai's PMPA rights per se, which also affected the rights of the Hemenways as his attorney and agent, but also it had, it became more and more obvious, many other effects as well. The question of Vo's being a mere scrambler so as to completely eliminate the red herring of Hoai's alleged wrongful eviction was just one of them. Such things as the availibility of a state common law remedy under the doctrine of Parratt v Taylor (1981) 451 US 527, 101 SCt 1908, 68 Led2d 420) would be one affecting the 1983 count. Such things as the claims of plaintiffs for having been injured in their property for having been witnesses and parties at the TRO hearing in the Superior Court would be very much affected

by the unknown outcome of the PMPA case -- it became apparent. That the franchise was Mr. Hoai's property was an issue affected by the outcome of the then pending cross motions for summary judgment in the PMPA case. It thus seemed eminently logical to await the outcome of those motions before undertaking to finalize the briefing and seek whatever amendments would be appropriate in this case.

Further, it is the law that when affidavits are filed with a dismissal motion under Rule 12(b)(6) for failure to state a claim and not excluded, (e.g. The Roseman Affidavit JA78 with exhibits A-L to include JA400, some 300 plus pages) the motion resolves into a summary judgment motion. The Court is then obliged to announce that resolution into a summary judgment motion and, in all but exceptional cases, allow some days (generally at least 10) for further briefing, amend-

ments to cure pleading defects, and motions for any discovery deemed necessary to resolution of the converted motions. (The Court below referred to these affidavits in its Memorandum Opinion in five different places. See:JA957) In addition there is the safeguard below of the fact statement required by Local Rule 108 from the moving parties. All that was ignored here. Instead, on the same day that the long-delayed summary judgment in favor of Hoai in the PMPA case was granted, this case was dismissed and a show cause was issued against counsel.

Subsequent events of record made it clear just why this was done and, though those subsequent events were not, obviously, before the lower court when it made its present decision, under the unusual circumstances of this case, because they candidly reveal the intentions of Judge Oberdorfer toward not only this litigation

but toward plaintiffs in general and Mr. Hoai's litigation as a whole and in particular when he made the decision which is the subject of the appeal. Plaintiffs were forced by the decision appealed from to respond to its show cause and to do so without specificity as to what it is that they were supposed to have done that violated Rule 11. In dealing with the sword hung over their head by the show cause plaintiffs and their counsel became convinced that not only had the lower court erred but that it had made serious mistakes and accordingly filed a Rule 60(b) motion, which is still pending. At the ensuing hearing, Feb. 5, 1991, the lower court revealed its intentions in doing what it did in issuing the decision, intentions which clearly are the sort of exceptional circumstances that make the ignoring of the procedural requirements normally surrounding summary judgment mo-

tions, and particularly those converted from Rule 12(b)(6) dismissal motions,[8] abusive of discretion and which also make the ignoring of the fact statement requirement of Local Rule 108 abusive[9] and which, further, make the consideration by this Court of arguments not made below imperative. For there can be no arguments below where the party who might make them has been deprived of the opportunity to do so by the court below. See the opinion of this Court in District of Columbia v Air Florida, Inc. (CA DC 1984.) 750 F2d 1077, 1084-1085.

As the record transcript of that hearing shows, counsel for Sun once again relied principally upon his oft-rejected

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[8]See Donaldson v Clark (CA11 1987) 819 F2d 1551, 1555.

[9]See this Court's opinion in Gardels v Central Intelligence Agency (CA DC 1980) 637 F2d 770, 773-74 and Thompson v Evening Star Newspaper Company (CA DC 1968) 394 f2d 774, 776-77 and the other cases cited.

but just as often revived preclusion argument, describing once again, couched in terms of a virolent attack on counsel (JA1573-1577), all of the litigation surrounding Mr. Hoai he could muster, (JA1575 and JA944-946) regardless of whether it involved his client and the events at issue in this case or not and regardless that the only decision of any finality did not involve his client or any defendant in this case other than Mr. Vo and involved federal statutes not at issue here, namely, RICO. Again Sun conveniently ignored that litigation was initiated by Vo. Going on at length in a thinly disguised repetition of his preclusion argument, Sun begged the Court to stop all of Hoai's litigation, speaking of it inclusively, not just this case. Following the personal attack on counsel, the lower court responded to Sun by stating unequi-vocally as follows: "The Court: I want to get

this done. What was it that General Powell said? Go ahead." (JA1592) We ask the Court to note that the cited Feb. 1, 1991 hearing was just one week after Genl. Powell had said to the entire nation and virtually the entire world on the most viewed television show ever produced that: "First we are going to cut it (the enemy) off, and then we are going to kill it." (JA1697-8)

Under these circumstances safeguards should have been observed not ignored, and plaintiffs' stay motions should have been ruled upon when the PMPA summary judgment was granted to Hoai with the moving parties in this case required to file a statement of facts claimed to be undisputed and with time for plaintiffs to file supplementally, amend and seek whatever discovery would be necessary. It is the purpose of the summary judgment procedure to assure that there are no

material factual disputes which should properly go to trial. In a case where intent is very much at issue, it was clearly the intent of the court below itself to ensure that plaintiffs did not get an opportunity to establish that there were material facts in dispute and that the complaint not be amended as it should have been.

III. THE 42 U.S.C. 1985 COUNT

The unamended complaint (ja01-22) was not artful because of the need to get something in before the statute ran once it became apparent that the PMPA case was not going to be decided before the three years had run, even though the summary judgment motion had been pending for over a year. It did not allege a violation of only subsection (3) of 1985. It alleged a violation of 1985. (JA19-20) In opposition it is pointed out that the deprivation of equal rights under 1985(3) re-

quires the racial animus or other class based inviduously discriminatory intent. The allegations of this in the original complaint[10] are not as complete as they could be, but it is clear: (1) that Hoai and Vo are Vietnamese; (2) that Hoai is a righteous Vietnamese and that Vo is an evil thug who preyed upon Hoai as he exclusively preys upon his fellow ethnics to the exclusion of other Americans; (3) that the other defendants knew this, and (4) that the Sun defendants in particular chose to abandon Hoai and give his property to Vo in violation of the federal rights of plaintiffs. Judicial notice should be taken of community knowledge of

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[10]As part of their Rule 60(b) motion plaintiffs have moved to amend. However, in light of the lower court's expressed intent it seems unlikely it will rule on the reconsideration motion out of fear that a ruling against plaintiffs on that motion would be appealable to this Court in time to be considered as part of this appeal, preventing the intended cutting off of Hoai's litigation.

racially oriented violence directed at Vietnamese. This we say bars plaintiffs from equal access to relief under the laws that are supposed to govern us and be available to all. Sun consciously decided that Vietnamese are such second class citizens and that a righteous Vietnamese could be denied access to the general law and its instruments. Every casual reader of American newspapers knows that Vietnamese are commonly abandoned to the familiar ethnic "mafia" type of organization that has plagued virtually every immigrant or minority group. This illegally discriminates, we argue, whether that contention is considered as applying the meaning of the statute or as a good faith extension of existing law. If private citizens can sue such characters and those who cooperate with them under 1985, such activity can be stopped by citizens themselves who are members of such ethnic

groups and who desire equal access to American justice. See our fuller discussion in the reply to the opposition of the Jones, Day defendants.

IV. CHILLING WITH A SHOW CAUSE

Every court of appeals that has considered the new version of Rule 11 has cautioned in one case or another that it should not be used to chill creative or vigorous advocacy. Here the lower court has stated that its purpose is to cut off and kill Mr. Hoai's litigation. (JA 1592; cf JA1697) Further, it has done so by simply issuing a show cause as part of its decision (JA955) where the rest of the decision consists of adopting the brief of certain of the defendants (Jones, Day)(JA1032-1063) without independent analysis, relying upon the findings and conclusions of those defendants in a manner which would not have been supported by the record if the lower court had not been

assiduous in making sure that there would not be a full record for this court to review.

V. PRAYER FOR RELIEF

For all of the foregoing reasons, appellants pray that their cause will be remanded to the District Court for trial.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that I have served by U.S. mail, first class, postage prepaid, two true and accurate copies of the foregoing Brief this 12th day of April, 1991, upon each of the following: J. Gordon Forester, Jr., Greenstein, DeLorme & Luchs, Suite 300, 1220 19th Street, NW, Washington, D.C. 20036-2400; Robert Pleshaw, 729 15th Street, NW, Washington, DC 20005; Francis X. Markey, Jones, Day, Reavis &

Pogue, 1450 G Street, NW, Washington, D.C. 20005.

John D. Hemenway

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

THANH VONG HOAI,
927 N. Highland St.
Arlington, Virginia
and

JOHN D. HEMENWAY,
4816 Rodman St., N.W.,
Washington, D.C.
and

DAVID HEMENWAY,
4816 Rodman St., N.W.,
Washington, D.C.

Plaintiffs,

v.

Civil
Action No.

THANH VAN VO a/k/a
Thoi Van Vo,
2242 Senseney Lane,
Falls Church, Virginia,
and

MILLARD F. OTTMAN, Jr.,
8111 Gatehouse Road,
Falls Church, Virginia,
and

DAVID C. ROSEMAN,
6511 Brawner Street,
McLean, Virginia,
and

JONES, DAY, REAVIS and POGUE

Cleveland, Ohio,
and

J. GORDON FORESTER, Jr.,)
1220 19th Street, N.W.,)
Washington, D.C.)
and)
)
GEOFFREY WAGNER,)
)
Tulsa, Oklahoma,)
and)
)
JOSEPH ZULLI,)
)
Philadelphia, Pennsylvania,)
and)
)
SUN REFINING AND MARKETING)
COMPANY, INC.,)
)
Philadelphia, Pennsylvania,)
)
Defendants.)

COMPLAINT

I. JURISDICTION

1) This Court has Jurisdiction Under the Civil Rights Laws 42 U.S.C. 1983 and 42 U.S.C. 1985 and to award attorneys' fees under 42 U.S.C. 1988 for violations of rights of due process guaranteed to the plaintiffs by the Constitution of the United States and violations of the rights of the plaintiffs to petition for the

redress of grievances guaranteed by the First Amendment.

2) All of the acts complained of herein were either committed in the District of Columbia or committed outside of the District of Columbia with the intent to affect the plaintiffs within the District of Columbia.

II. VENUE

3) Plaintiff Hoai, in April of 1986, was granted a valuable gasoline station franchise and lease by the defendant Sun Refining and Marketing Company, Inc. ("Sunoco") which station was located in the District of Columbia at 2305 Pennsylvania Avenue, S.E.

4) The franchise contract between Hoai and defendant Sunoco was negotiated and entered into in Alexandria, Virginia, but concerned the station in the District of Columbia.

5) An alleged contract of transfer claimed by defendant Vo as transferring the station business from plaintiff Hoai to defendant Vo was a document executed in Virginia though the threats of death and violence used to make defendant Hoai sign it were made in Virginia and the District of Columbia.

6) The conspiracy to deprive the plaintiffs, as a legitimate franchisee and his agents, of protection of the law equal to that accorded an intruder who had accomplished possession by deceit and threats of violence and death, occurred principally in the District of Columbia, though it did involve telephone calls to Sunoco's legal department in Philadelphia.

7) The use of the color and authority of the laws, customs and rules or regulations of the courts of the District of Columbia to deprive plaintiffs of rights, privileges and property without due pro-

cess and in violation of their rights to petition for the redress of their grievances occurred principally in the District of Columbia.

III. PARTIES PLAINTIFFS

8) Plaintiff THANH VONG HOAI ("HOAI") is a citizen of the United States who resides at 927 N. Highland St., Arlington, Virginia and did so reside at all times pertinent hereto. He did business at the gas station in question in the District until intimidated by threats of murder and violence from Vo and another from coming to that site.

9) Plaintiff JOHN D. HEMENWAY is a resident of the District of Columbia and a member of its bar. He participated in meetings about the gas station as HOAI's counsel and took part in the events at the gas station on August 25 and 26, 1986, as alleged herein as newly-retained counsel for Hoai. He was then named as a

defendant in a law suit in the Superior Court of the District of Columbia as part of the events complained of herein.

10) Plaintiff DAVID HEMENWAY is a resident of the District of Columbia and the son of JOHN D. HEMENWAY. He had met and become acquainted with HOAI and helped to persuade his father to help Hoai as an attorney. Throughout the events alleged herein he acted to help the Hoai as the latter's friend and agent and also to help his father if he could.

DEFENDANTS

11) Defendant THANH VAN VO ("VO") is an adult resident of Virginia who resides at 2242 Senseney Lane, Falls Church, Virginia, and did so reside at all times pertinent hereto.

12) Defendant DAVID C. ROSEMAN resides at 6511 Brawner Street, McLean, Virginia.

13) Defendant MILLARD F. OTTMAN, Jr. resides at 8111 Gatehouse Road, Falls Church, Virginia.

14) Defendant JONES, DAY, REAVIS and POGUE is the law firm partnership of which the third-party defendants ROSEMAN and OTTMAN were members at the times in question. It has an office and does business in the District of Columbia and did at all times pertinent hereto. Its main office is in Cleveland, Ohio, which has a statute permitting suing a law partnership in a single name and serving it in one place, its headquarters, with a single service.

15) Defendant Sunoco is a major oil company whose headquarters are in Philadelphia, Pennsylvania, and which is incorporated in Delaware and registered to do business in the District of Columbia, where events complained of took place and where the service station franchised and leased by it to the plaintiff is located.

Its resident agent in the District of Columbia is CT Corporation Systems, whose address for such resident agency is 1030 15th Street, N.W., Washington, D.C.

16) Defendant Joseph Zulli is a staff attorney for defendant Sunoco and the head of its legal department, or so Sunoco managerial personnel responsible for the station in question have stated. He was head of the legal department at Sunoco and participated actively in the decision to use the color and authority of state-law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. Law and otherwise.

17) Defendant Geoffrey (or Jeffrey) Wagner is a staff attorney for defendant Sunoco, who was, at the times pertinent hereto, in its legal department in Philadelphia under the management of defendant Zulli. He was in the legal department at Sunoco and participated actively in the

decision to use the color and authority of state law to deprive plaintiffs of rights, privileges, immunities and property under color of D.C. Law and otherwise. After the controversy arose he was moved to the Sun pipeline division in Tulsa, Oklahoma, conveniently, and Sun has fiercely resisted the plaintiffs' obtaining any information which would shed further light on what he did. After the storm passes, if it does, Sunoco plans to fire him, plaintiffs believe.

18) J. Gordon Forester, Jr., is an attorney practicing in Washington, D.C., who was retained as outside counsel by Sunoco and participated as such in the events complained of. Though he states that he was merely a water boy following orders from Wagner and/or Zulli in carrying out the acts which are the subject of this complaint, plaintiffs do not believe that attorneys are so free to ignore or

disclaim responsibility for the import of actions they take or filings with a court that they sign and, accordingly, allege that he participated as a principal in the acts which are the subject of this complaint.

IV.

19) During the events complained of herein, defendant Sunoco first encouraged plaintiff Hoai, who had previously been their employee for a number of years, as well as an owner of a prior franchise from Sunoco, in Maryland, to apply for a lease and franchise, (formerly "dealership,") then, after a thorough procedure of evaluating him against other applicants, granted him a lease and franchise, entering into a lease and franchise with him and doing so in the Commonwealth of Virginia, the agreement being for the lease and franchise of the Sunoco station on

Pennsylvania Avenue, S.E., in the District of Columbia.

20) Plaintiff Hoai had previously been a dealer of Sunoco's for two years more or less in Greenbelt, Maryland and, therefore, under the terms of the Petroleum Marketing Practices Act (PMPA) 15 U.S.C. 2801 et seq. by statute cannot have been and was not a trial franchisee in his franchise with Sunoco at 2305 Pennsylvania Avenue, S.E. despite the title on the franchise agreement and was in fact a regular franchisee or dealer by definition under the terms of the Federal statute, regardless of any language in a contract. (He does not here, however, sue under that federal Act, but has done so separately.)

21) Defendant Sunoco adduced and then acknowledged, through its regional supervisor overseeing the station, Ernest Peele, that the relationship of defendant

VO to plaintiff Hoai was purely represented by defendant VO to be that of a lender, for Peele was told this by VO together with HOAI in April of 1986, well before the events in question here, though the representation by VO that he was lending money to HOAI for the business as a fellow Vietnamese businessman on a friendly basis was a false claim because in fact what VO did was to claim to be lending $35,000.00 to HOAI for the franchise by depositing the same into an account at a far away bank which he, VO, opened as a "favor" to HOAI and insisting on controlling as "security."

22) In fact VO never put any such $35,000.00 into the bank account he insisted on controlling and refused to let HOAI have access to as alleged "security" but only "salted" the account with a few thousand dollars and then took control of the station's daily receipts, also in the

name of "securing" his "loan" and deposited them into the station account which he had established and taken control of.

23) That the account was insufficient and VO was not telling the truth in this regard became evident and was known to SUNOCO when the first large check for gasoline on the station account, in excess of nine thousand dollars, bounced and was returned for insufficient funds at the end of April, 1986, and at that time HOAI informed SUNOCO of VO's deceit in this regard.

24) VO and HOAI had both told Peele of Sunoco under specific questioning that VO was a lender to HOAI and not one who had in any way a partnership or equity interest in the franchise in question, hidden or overt.

25) As events in question developed, defendant Sunoco acknowledged in May,

June, July and August of 1986 that plaintiff Hoai was being improperly excluded from the station which they owned and of which they have maintained throughout he was, at the time, the franchisee.

26) During these months defendant Sunoco encouraged plaintiff Hoai to take steps to help himself to stop the usurping activity of defendant VO and secure his lease and franchise from the ongoing intrusion of VO. Sunoco was on notice as to, and acknowledged to plaintiff Hoai the ongoing threat of extortion including threats of death and violence.

27) Nonetheless, when plaintiff Hoai did so act to stop the illegal activity by VO, instead of standing by the plaintiff HOAI and supporting him as promised, defendant SUNOCO then made an agreement or deal with the defendant VO in condonation of what was known to defendant SUNOCO to be VO's extortionate and fraudulent behav-

ior in violation of its franchise agreement with plaintiff Hoai in order to "keep pumping gas" and SUNOCO effected this deal with VO by illegal and unconstitutional use of the color and authority of the laws, customs and regulations of the District of Columbia, to wit, by "extension" of an improvidently granted Temporary Restraining Order (TRO) without notice to Hoai and the other two plaintiffs, known to SUNOCO and VO to be HOAI's attorney and agent representing him at the time. This failure to involve or give notice to plaintiffs was despite the fact that it was well known to all defendants that Hoai was the legitimate franchisee of the franchise in question and the primary party at interest under applicable law.

28) But plaintiff HOAI remained named as franchisee and lessee of the defendant SUN OIL AND REFINING COMPANY for the station in question by terms of his agreement

for seven months thereafter more or less though his franchise had de facto been terminated and interfered with by VO and the defendant Sunoco, after which Sunoco sent a letter to plaintiff HOAI that he was not going to be kept as a lessee and franchisee because during the time in which Sunoco conspired with VO to keep him out of the station he, HOAI, had allegedly not pumped enough gas or in the alternative, he had allegedly not kept proper storage records. Both tasks had been made impossible by the actions of Sunoco in concert with or through the other defendants, particularly Vo, in violation of their contract with plaintiff HOAI.

29) The plaintiff John D. Hemenway, at the times pertinent hereto, was the attorney for and represented the plaintiff HOAI.

30) The plaintiff David Hemenway, at the times pertinent hereto, was the agent

of the plaintiff HOAI, and he is a son of John D. Hemenway. He was working with Hoai at the service station franchise located at 2305 Pennsylvania Avenue, S.E., Washington, D.C., which was taken from Hoai by extortionate methods, using deceit and threats of violence, coupled with acquiring the capital of plaintiff Hoai by inducing him to enter into another business, the Mekong Food Service Center, a Vietnamese specialty food and gift shop located in the Mekong Center Building at 3107 Wilson Boulevard, Arlington, Virginia, by deceit, which business was then forcibly taken from HOAI by others acting in concert with defendant VO, along with its inventory, worth over $49,000.00 at cost, and the ongoing business as built up by plaintiff HOAI.

31) So that VO, acting with others, simultaneously prevented HOAI from being able to operate his gas station business

by "suckering" HOAI's capital for the gas station under the guise of the promise of a phony loan into another business and then taking both business interests in a classic extortionist's maneuver.

32) As part and parcel of these maneuvers by VO and others not named in this suit, but whose actions plaintiffs advised the defendants herein of at various times, the defendants herein ROSEMAN, OTTMAN and the firm of JONES, DAY, REAVIS, and POGUE, in combination with VO as their client, on August 28, 1986, used sworn affidavits which they knew were false, or, in the case of the attorneys for VO, should have known they were false as reasonable men in their profession, and using those false affidavits filed and obtained a motion for a TRO in the Superior Court of the District of Columbia, which, by the ineptitude and error of that court they obtained (since, under applicable federal

law even the false swearing in the affidavits did not justify the TRO).

33) This TRO was obtained by the attorney and defendant OTTMAN by false statements made to the Superior Court judge which statements were accepted as fact erroneously and incompetently by that judge and she made "findings" based upon mere colloquy with defendant OTTMAN as if his statements were postulates with nothing else in the record to support them. The legal theory upon which these findings were based and upon which the TRO was bottomed was not even before the Superior Court and had not been included in any way by the defendants VO, ROSEMAN, OTTMAN, and JONES, DAY, REAVIS and POGUE in any filing that was then before the Superior Court, no notice as to it was given. But the defendants named used an erroneous and illegal theory of law based on false swearing, and, in the case of defendant OTTMAN,

of false testimony, (though not under oath,) to use in turn the color and authority of the Superior Court and its customs to deprive plaintiff HOAI of his service station franchise and livelihood and income and to deprive the plaintiff JOHN D. HEMENWAY of his representation of plaintiff HOAI and his station franchise and DAVID HEMENWAY of his work in the station with plaintiff HOAI and his possible partnership interest in the same.

34) Further, by false charges and in violation of applicable law the defendants VO, ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE deprived plaintiff HOAI of his right to a counsel of his choosing and plaintiff JOHN D. HEMENWAY of his right to freely represent his client HOAI in accordance with applicable law, all of this being done under color and authority of the laws, regulations or rules, and customs of the District of Columbia.

35) Similarly, the same defendants, by the use of false swearing and false testimony as aforesaid, deprived all of the plaintiffs of their freedom to travel in and in the vicinity of the gas station franchise in question and to operate the same.

36) At that time the present defendant in this suit, SUNOCO, was named by the present defendants VO, ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE as a co-defendant in the Superior Court suit and SUNOCO, as a result, held itself out throughout the TRO hearing as "standing by" its dealer, the plaintiff HOAI, testifying on HOAI's behalf (defendant VO, though present, declined to testify, as he has ever since on pertinent topics), through it area representative and supervisor, Ernest Peele, and HOAI's attorney, with the acquiescence and consent of

Peele, was also SUNOCO's attorney at that TRO hearing. This was on August 29, 1986.

37) Secretly, at some time on or after September 3, 1986, however, defendant SUNOCO changed sides without notifying plaintiffs, in order to keep "pumping gas" with the specific purpose of intent of depriving its dealer of his franchise.

38) Defendant SUNOCO entered into an independent agreement with the defendant VO, through the offices of the defendants ROSEMAN, OTTMAN and JONES, DAY, REAVIS and POGUE for VO and the defendants ZULLI, WAGNER and FORESTER for SUNOCO, under which the lawyer defendants falsely represented to the SUNOCO management that was responsible for the station that under the law of the District of Columbia, by making this "deal" between them SUNOCO and VO could give the station to the latter, along with its supply of product from

SUNOCO, by "extending" the TRO by agreement between them without notice to or involvement of plaintiff HOAI or his counsel or agents.

39) Consequently, on September 8, 1986, the aforesaid defendants did so "extend" the TRO by a "consent order" from which plaintiff HOAI was specifically excluded by its terms, which declared the agreement applicable to SUNOCO and VO only and not to HOAI.

40) The defendants obtained a signature from a Superior Court judge on this "consent order" extending the TRO based on false swearing and only after obtaining that signature did they reveal their bargain and deal whereby SUNOCO had abandoned its franchisee and removed his station from his control by delivering to HOAI, as that franchisee, and his counsel a copy of the "consent order".

41) The signing of this "consent order" merely ratified the agreement between SUNOCO and VO and did not represent any independent judgment of the Superior Court.

42) Nonetheless it was done under the color and authority of the Superior Court and its rules and the laws governing it as well as its customs, and the defendants held out to the Sunoco managers directly responsible for the station, Peele and Vaughan, that the Superior Court had required this result depriving HOAI of his station and franchise. Defendants held this out to others as well.

43) Thus the lawyer defendants held out falsely that a TRO could be extended without notifying the major party in interest and without his consent and that there were holdings and findings in a TRO hearing at which the defendant VO had declined to testify and the only live

"testimony" was his lawyers false statements and the affidavits were falsely sworn, which holdings and findings required the agreement and "side-switching" by the defendant SUNOCO which was in fact voluntary. Then they used the device of getting an unwitting judge of the Superior Court (not the TRO judge) to sign and ratify their voluntary agreement without any exercise of independent judgment by that judge to give their merely private agreement the color and authority of the laws, regulations and customs of the District of Columbia in order to deprive plaintiffs of their property, rights, privileges and immunities as complained of herein.

44) For over two years afterwards defendant SUNOCO and its attorney, defendant FORESTER, though fully cognizant of the falsity of these representations, continued to represent that this "exten-

sion" of the TRO, which represented no independent judgment by any Superior Court judge, was "res judicata" and that the attempts by the plaintiffs to negate its insidious and harmful effects legally, which had been necessitated by these acts of the defendants, were a "collateral attack" on the "judgment" of the Superior Court, even after the United States Court of Appeals for the District of Columbia Circuit, in a separate proceeding against the defendant SUNOCO by the plaintiff HOAI, had pronounced in a formal opinion that such was not the case.

V. COUNT ONE

Violation of Civil Rights Laws, 42 U.S.C. 1983, Color of D.C. Law

42) Plaintiffs incorporate herein by reference the allegations of 1 through 41 above.

43) The law of the District of Columbia and the practice, rules and custom of the Superior Court of the District of Columbia as well as the Due Process clause of the United States Constitution and the right to petition for the redress of greivances enshrined therein require that in any proceeding, no action be taken which principally affects a party to that proceeding without adequate notice to that party and a chance being granted for that party to respond and participate in that process which affects his interests.

44) Here the defendants, and all of them, schemed and planned to evade those requirements and to instead use the very color of law and apparent authority of the Superior Court to deprive the plaintiff Hoai of those important rights, privileges and immunities and of his property the gas station franchise.

45) The use of the "extension" of the TRO by a "consent order" not involving and specifically excluding the plaintiff HOAI was a conscious device adopted knowingly to deprive the plaintiff HOAI of his property and his right to petition for redress at a follow-on hearing without due process of law and in violation of law and rules and to do so by a false appearance of judicial authority or mandate when there was in fact no independent judgment involved and all that was involved was a voluntary agreement between and among the defendants to thus deprive plaintiff HOAI and his counsel and agent, the two Hemenways,i.e., by the color and authority of the laws of the District of Columbia governing its courts and judicial processes.

46) For years thereafter, the defendants, in varying capacities and degrees, continued to so use the color and authority of the District of Columbia to

deprive plaintiffs of their due process, deprive them of their right to petition for redress in accordance with the law and otherwise deprive them of their right to work and operate in freedom from harassment and oppression.

WHEREFORE the plaintiff HOAI claims, under this Count One,

damages for the loss of his station and franchise in the amount of $30,600,000.00, being the full value of the franchise he was thus illegally and unconstitutionally deprived of under color and authority of the laws, regulations and customs of the District of Columbia over a span of twenty years, plus attorneys fees in excess of $300,000.00 and mounting and for the deprivation of his right to counsel of his choosing.

Plaintiff John D. Hemenway prays for attorney's fees and lost opportunity time in the amount of $300,000.00 and mounting

for the deprivation of his right to represent the business and participate as HOAI's counsel and the loss of business and business time and the loss of his job and office arrangement which directly resulted as well as for deprivation of his right to represent clients within the law, free of being disqualified by false swearing and false representation in violation of an attorney's duty to forswear false representations and participation in wrongdoing by the defendants OTTMAN and ROSEMAN and their firm, JONES, DAY, REAVIS and POGUE.

Plaintiff David Hemenway prays for damages in the amount of $300,000.00 dollars or above for the deprivation of his participation in the station business and the job affiliated with it.

VI. COUNT TWO,

42 U.S.C. 1985

47) Plaintiffs incorporate herein by reference the allegations of 1 through 41 above.

48) The same constituted a conspiracy to deprive defendant Hoai of his property rights by the agreement and conspiracy entered into by Roseman, Vo, Ottman, and the defendant Jones, Day, Reavis and Pogue by the use of false swearing in affidavits and false testimony by OTTMAN under the guise of argument of counsel to deprive the plaintiffs of property, rights privileges and immunities as set out in Count One above, the same being hereby incorporated by reference, all of which constituted an invidious discrimination by which a rightful franchise holder is discriminated against in favor of an intruder by deceit and threats of violence.

49) Under the effects of such a conspiracy there is an invidious discrimination against the legitimate holder of a

franchise as a representative of such a class and by virtue of his holding of the franchise as against those who have no such legitimate claim but rely upon deceits and threats of force.

50) This was accomplished here by a knowingly false use of a charge of being a landlord under color of District of Columbia law by defendant SUNOCO as the only landlord actually involved acting in conspiracy with the other defendants.

WHEREFORE the plaintiff HOAI claims, under this Count Two,

damages for the loss of his station and franchise in the amount of $30,600,000.00, being the full value of the franchise he was thus illegally and unconstitutionally deprived of under color and authority of the laws, regulations and customs of the District of Columbia over a span of twenty years, plus attorneys fees in excess of $300,000.00 and mounting and for the

deprivation of his right to counsel of his choosing.

Plaintiff John D. Hemenway prays for attorney's fees and lost opportunity time in the amount of $300,000.00 and mounting for the deprivation of his right to represent the business and participate as HOAI's counsel and the loss of business and business time and the loss of his job and office arrangement which directly resulted as well as for deprivation of his right to represent clients within the law, free of being disqualified by false swearing and false representation in violation of an attorney's duty to forswear false representations and participation in wrongdoing by the defendants OTTMAN and ROSEMAN and their firm, JONES, DAY, REAVIS and POGUE.

Plaintiff David Hemenway prays for damages in the amount of $300,000.00 dollars or above for the deprivation of his

participation in the station business and the job affiliated with it.

[BY HAND: A jury trial is respectfully demanded. per JDH]

Respectfully submitted.

Thanh Vong Hoai
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By Counsel

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